

من ذكريات العمل(9)

مشروع قناطر نجع حمادى الجديد

قضية التحكيم عن النزاع الخاص

بتطبيق معامل تغير الأسعار على الدفعة المقدمة

ترجع وقائع هذه القضية الى فتره انشاء مشروع انشاء قناطر نجع حمادى الجديد فى الفترة من اول يوليو 2002 الى نهاية يونيو 2008 وواضح من عنوان القضية انها كانت بسبب الخلاف بين وزارة الموارد المائيه والرى ممثلة فى ادارة المشروع وبين اتحاد الشركات الاوروبيه والمصريه المسند لها تنفيذ الأعمال المدنية للمشروع ممثله فى شركات فينسى الفرنسيه وبلفنجر برجر الالمانيه واوراسكوم المصريه فى مفهوم تطبيق معامل تغير الاسعار وعلاقتها بالدفعة مقدمه

وتبسيطا للقضية ان مجموعة الشركات المنفذة ترى الآتي:

انه طبقاً للعقد يجب تطبيق معامل معادلة تغيير الأسعار بالزيادة أو النقص على القيمة الإجمالية للعقد قبل استرجاع قيمة الدفعة المقدمة، وبهذا المفهوم فإن اتحاد الشركات المنفذة يري تطبيق معامل معادلة تغيير الأسعار على قيمة الدفعة المقدمة.

بينما إدارة المشروع أنه طبقاً للعقد فإنه يجب تطبيق معامل معادلة تغيير الأسعار بالزيادة أو النقص على القيمة الإجمالية للعقد بعد استرجاع الدفعة المقدمة، أي أن قيمة الدفعة المقدمة لا تخضع لتطبيق معامل معادلة تغيير الأسعار .

وتتمثل اهميه هذه القضية فى الآتى:

- هذه اول قضية يرفعها المالك ضد احد المقاولين على غير المعتاد كما فهمنا ذلك من السادة المحامى واعضاء هيئة قضايا الدولة وتكسبها.

- ان مجموعة الشركات كانت انتدبت للدفاع عنها مكاتب محاماة عالميا ومحليا وهو مكتب الشلقانى للمحاماة امام محامى وحيد من طرف المالك وهو الدكتور كريم حافظ.

- انها كانت بعد خسران القضية امام لجنة فض المنازعات ال DAB وكان الاعتقاد السائد ان يكون الحكم عدم مخالفة لجنة قض المنازعات.

-ان الحكم الذى صدر كان باجماع الاراء وليس بالاغلبية كما هو متوقع وهذا دلالة على التوفيق فى اتخاذ قرار اللجوء الى التحكيم بالرغم من خطورته وان الذى حدث من لجنة فض المنازعات كان خطأ كبيراً.

-انه ارسى قاعدة قانونيه فى مفهوم تطبيق معادلة الاسعار.

-انه اغلق الباب امام باقى المقاولين فى الحزم الاخرى مما جنب الدخول معهم فى منازعات تقدر بحوالى 60 مليون جنيه.

-كان حكم لجنة فض المنازعات غريباً ولم يكتف باصدار الحكم لصالح مجموعة الشركات ضارباً عرض الحائط بكل البنود واشترطات العقد وانما يطلب بكل جرأة الغاء او تعديل مادة من مواد العقد وان تستبدل كلمة after بـ كلمة before لكى تتمشى مع باقى مواد العقد من وجهة نظرها فى سابقة لم تحدث من قبل.

وكان ملخص الحكم كالاتى:

ان الحكم ايد 100% من طلبات المالك

-رد كل المبالغ وتقدر باكثر من 40 مايون جنيه وعليها فائده 5 % عن الفترة السابقة.

-ان يقوم المقاول بدفع 2/3 اتعاب التحكيم وقدرها حوالى 270 الف يورو.

-ان يدفع المقاول للمالك حوالى مبلغ 45 الف يورو فى خلال 30 يوما (وهو الفرق 1/2 و

1/3 التكاليف والا سيتحمل فائده تقدر ب 5% عن اى مدد تاخير .

وهنا اود ان اشير الدور البارز الذى قام السيد المهندس ابراهيم على ابو النجا الذى كان يشغل مدير عام الاعمال الكهروميكانيكيه فى المشروع وفى نفس الوقت الاشراف على تنفيذ العقد.

حيث أسهم حضوره فى لجنة المناقشات قبل توقيع العقد مع المقاول فى تقديم فهم دقيق لجميع بنود العقد ومتطلباته. بالإضافة إلى ذلك، كان حضوره كشاهد أمام محكمة التحكيم بالغ الأثر، حيث قدم شهادته التي أضافت مصداقية قوية لدفاع الوزارة وأسهمت بشكل مباشر في الحصول على حقوقها.

اردت بهذا البوست ان اوثق هذا الحدث الهام الذى عايشناه اثناء التنفيذ وان اتوجه بالشكر والتقدير كل الأطراف التي شاركت فى المناقشات والتحضير، وانتهاءً بشهادات الشهود

أمام المحكمة. وينبغي أيضاً وذكر الأثر الطيب الذي تركه أولئك الذين انتقلوا إلى رحمة الله، راجين لهم المغفرة والرحمة.

هذا التوثيق ليس مجرد شكر، بل هو سجل يمكن الاستفادة منه لمن يواجه قضايا مشابهة، ويؤكد على أهمية التمسك بالحقوق والدفاع عنها. فالحقوق لا تضيع مادام وراءها من يطالب بها بإصرار وإيمان.

معذرة لطول البوست ولكن قدرت ان تجزئته قد لا يكون مفيدا
كما اضفت له بعض المرفقات التى اراها هامة جدا لم يود مزيدا من الفائدة
الملاحق:

- 1-قرار لجنة فض النزاعات
- 2-اعتراض المهندس عبد الرحمن شلبى
- 3-حكم محكمة التحكيم
- 4-ملخص حكم محكمة التحكيم
- 5-شهادة المهندس ابراهيم ابو النحا
- 6-موافقة السيد الوزير على التحكيم
- 7-القرار رقم 423 بتاريخ 19-9-2006 بتشكيل لجنة متابعة اعمال التحكيم
- 8-مسودة قرار السيد الدكتورالوزير بعد التعديل
- 9-صور اعضاء لجنة التحكيم من الوزارة وهيئة قضايا الدولة والمحامى
- 10-جريدة المصرى اليوم 14-08-2007

لينكات

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https://drive.google.com/.../1_ymojcwjf0bsaxsst2.../view...

3 <https://drive.google.com/.../1cxUV1ID59DB47bBjWoJ.../view...>
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https://drive.google.com/.../19EEXTJXZ_GI9956YVIB.../view... عرض

وسنحاول هنا عرض وقائع القضية بشئ من التفصيل كالآتي :

أولاً: مقدمة

• قامت وزارة الموارد المائية والرى ممثلة في قطاع الخزانات والقناطر الكبرى بطرح مناقصة بين الشركات العالمية المتخصصة والتي اجتازت التقييم الأولي وذلك لزوم تنفيذ الأعمال المدنية Lot 1&2 لمشروع قناطر نجع حمادي الجديدة ومحطتها الكهربائية.

• تم عمل التقييم الفني والمالي بين العطاءات المتقدمة والتي إنتهت الي قبول العطاء المقدم من اتحاد شركات (فينسي الفرنسية – بيلفنجر الألمانية – أوراسكوم المصرية) وقد تم إستدعاء اتحاد الشركات المشار اليه لإجراء مفاوضات ما قبل توقيع العقد وذلك خلال الفترة من 2002/01/22 وحتى نهاية مايو 2002 .

• علي ضوء ما انتهت اليه مفاوضات ما قبل التعاقد تم توقيع عقد تنفيذ الأعمال المدنية Lot 1 لمشروع قناطر نجع حمادي الجديدة ومحطتها الكهربائية مع اتحاد الشركات المشار اليه في 2002/06/01 وقد تم تسليم الموقع وبدء تنفيذ الأعمال في 2002/06/03.

ثانياً - مواد ونصوص العقد المتعلقة بالنزاع:-

• وردت في المادة " 5. 1 b " من الاشتراطات العامة للعقد

"يعتبر العقد عقداً مصرياً ويخضع ويفسر وفقاً لأحكام القوانين المصرية "

• تضمن العقد الموقع مع اتحاد الشركات " المقاول " في المادة " 60.1 " من الاشتراطات العامة قيام المقاول بتقديم فواتير "مستخلصات " كل شهرين بقيمة الأعمال ويجب أن تقدم الفاتورة بالتتابع الوارد علي النحو الآتي:

a-"القيمة التقديرية الكلية للأعمال منذ بدء العمل وحتى نهاية الفاتورة المقدمه .

– b القيمة التقديرية الكلية للأعمال منذ بدء العمل وحتى نهاية فترة الفاتورة السابقة.

c-قيمة الأعمال خلال فترة الفاتورة وذلك بخصم القيمة الواردة في البند (b) من القيمة الواردة في البند(a)

d-قيمة ما تم تنفيذه من تعديلات (أوامر إضافية) خلال فترة الفاتورة.

e-قيمة ما تم تنفيذه من أعمال اليومية خلال فترة الفاتورة.

f-المبالغ التي تعكس التغيرات في التكاليف والتشريعات بموجب المادة (70) والتي يعبر عنها بالمبالغ المدفوعة بالعملات المحلية والأجنبية.

G -g -

H-h-

– المبالغ الواجب استقطاعها نظير استرجاع الدفع المقدمة حسب ما هو وارد في المادة
"(60.7)

• كما وردت في المادة "60.7" من الاشتراطات العامة الآتي :

• كما وردت في المادة "70.1" من الاشتراطات العامة للعقد والمعدلة بالملحق رقم "5" في البند رقم 11-3-5 الآتي :-

• كما وردت في المادة "70.3" من الاشتراطات العامة للعقد المعادلة التي سيتم تطبيقها لحساب معامل زيادة الأسعار عليها والواردة في الفواتير المقدمة كل شهرين والمقدمة من المقاول طبقاً للمادة "60.1"

• وقد وردت في المادة "70.6 a" من الاشتراطات العامة للعقد تحديد المبالغ التي سيتم تطبيق معامل زيادة الأسعار عنها علي النحو التالي:

ثالثاً - بداية النزاع

• قامت إدارة المشروع بحساب معاملات زيادة الأسعار وكذا قيمتها طبقاً لما هو وارد بعاليه دون وجود أي خلاف مع المقاول حتي الفاتورة رقم "11" وهي الفاتورة التي تجاوزت فيها نسبة الأعمال للمكون المحلي 30% من قيمة العقد والفاتورة رقم "19" والتي تجاوزت فيها نسبة الأعمال للمكون الأجنبي 30% واستحق طبقاً للمادة "60.7" والمشار إليها عاليه بدء قيام المقاول باسترجاع الدفعة المقدمة للمالك.

• عند بدء إسترجاع الدفعه المقدمه طبقاً لما هو مشار إليه عاليه نشأ النزاع بين المالك والمقاول في كيفية تطبيق معامل تغير الأسعار علي الفاتورة المقدمه من المقاول من كون حسابها علي إجمالي قيمة الفاتورة أو تطبيقها علي مبلغ الفاتورة بعد إستبعاد قيمة الدفعة المقدمه.

• إن النزاع بين المالك والمقاول في هذا الشأن يرجع إلي إختلاف وجهتي النظر في تفسير بنود ونصوص العقد وكذا اولويات تلك البنود عند التطبيق علي النحو الموضح بعد .

رابعاً - رأي المقاول:-

• يري المقاول أنه طبقاً للتتابع الوارد في المادة "60.1" فإن معاملات زيادة الأسعار يجب تطبيقها علي المبالغ المستحقة له تحت البند "60.1" C قبل إستقطاع الدفعة المقدمة حيث أن

حساب مبالغ زيادة الأسعار قد وردت في التتابع الوارد في المادة " 60.1 " تحت البند رقم f " منها أما استرجاع الدفعة المقدمة للمالك فقد ورد لاحقاً في هذا التتابع في البند " i " من هذه المادة.

• إن هذا الترتيب علي النحو الوارد بالعقد والملزم للتطبيق قد إعطاه حقاً تعاقدياً في تطبيق معامل تغير الأسعار علي القيمة الكلية للفاتورة المقدمه ثم يلي ذلك طبقاً للترتيب المشار إليه إستقطاع جزء الدفعة المقدمه المسترجع.

• إن العقد في المادة " 60.7 " أورد أن الدفعة المقدمه سيتم تقديمها لأعمال التجهيزات ودون اي فوائد وعليه فإن إستبعاد الجزء المسترجع من الدفعة المقدمه من الفاتورة يعني إنتفاء ذلك وتعارضه مع روح العقد في هذا السياق.

• كما يري المقول أن العقد لم يشر في المادة " 70.3 " من الإشتراطات الي أن المبالغ التي سيطبق عليها معامل زيادة الأسعار Price Adjustment سوف يستبعد منها قيمة ما سيتم استرجاعه من الدفعة المقدمة .

• أما فيما يخص المادة " 70.6 a " فهي من وجهة نظره معنيه بمبالغ الدفعة المقدمة التي من المنظور استرجاعها لاحقاً وليست تلك المسترجعة من خلال الفاتورة الجاري صرف مستحقاته عنها.

• إن ما تم تقديمه أثناء مرحلة مفاوضات ما قبل توقيع العقد عند طلبه زيادة الدفعة المقدمه من 15% إلي 25% والتي أخذت في إعتبارها تطبيق المادة " 70.6 a " فقد جاء بحسن نية من مفاوضيه وعلي ضوء تفسير المالك لهذه المادة والتي ثبت من وجهه نظره أنها تتعارض مع نصوص وبنود العقد.

• إن زيادة معدلات تضخم الأسعار عن ما هو متوقع له ورغم تعويضه عنها إلا أنها لم تغطي كل ما تكبده من خسائر ناتجة عن زيادة تلك المعدلات وخاصة ما يتعلق بالمكون المحلي وما طرأ من تغيرات لسعر حديد التسليح والذي يعد أحد العناصر الرئيسية لمكونات المشروع.

خامساً - رأي المالك :-

• يري المالك أن المادة " 60.1 " هي مادة قد وردت في العقد لإيضاح الكيفية التي سيتم تقديم الفاتورة " المستخلص " عليها أما عن كيفية حساب المبالغ الخاصة بكل بند من " a " الي " j "

"من المادة " 60.1 " وطبقاً لما هو وارد في هذه المادة ذاتها فإن طريقة الحساب الخاصة بهذه البنود ستتم طبقاً للمواد المتعلقة بها في اشتراطات العقد.

• أن البند " f " من المادة " 60.1 " قد أورد أن طريقة حساب مبالغ زيادة الأسعار ستتم طبقاً للمادة " 70 " من اشتراطات التعاقد والتي تشتمل علي المادة الفرعية " 70.6 a " والوارد بها نص صريح يفيد أن معامل زيادة الأسعار سيتم تطبيقه علي مبالغ الفواتير بعد إستبعاد جزء الدفعة المقدمة المسترجع من المقاول.

• أن المقاول قد قام باستلام الدفعة المقدمة عقب توقيع العقد وذلك لتمكينه من البدء في إعداد الموقع وتجهيزه لتنفيذ الأعمال وكذا شراء المواد والخامات التي يتطلبها العمل عند مرحلة بدء العمل . وقد تمت تلك الأعمال دون حدوث أي تأثير لها بزيادة الأسعار وعليه فإن هذه المبالغ وهي المتعلقة بالدفعة المقدمة يجب استبعادها من مبالغ الفواتير " المستخلصات " الواجب تطبيق معامل زيادة الأسعار عليها.

• أن المقاول أثناء مرحلة مفاوضات ما قبل توقيع العقد قد تقدم للجنة المفاوضات بإقتراحين لزيادة الدفعة المقدمة من 15 % الي 25 % ورغم أن لجنة المفاوضات قد رفضت هذين الإقتراحين لمخالفتهم لشروط العقد الا إن هذين الإقتراحين أظهر ا مدي فهم المقاول لما هو وارد في المادة " 70.6 a " من أن الدفعة المقدمة المسترجعة منه سيتم إستبعادها من المبالغ التي سيطبق عليها معامل زيادة الأسعار.

• انه يتم تطبيق هذا المفهوم مع مقاول الحزمه الثانيه بدون ايه مشاكل.

سادساً - لجنة فض المنازعات :- (DAB) " Dispute Adjudication Board "

• طبقاً للمادة " 67 " من اشتراطات التعاقد والمعدلة في الملحق رقم " 5 " من مستندات العقد فقد ورد في المادة الفرعية " 67.1 " منها أنه في حالة نشوب نزاع بين المالك والمقاول فيما يخص تنفيذ العقد فإنه سيتم إحالة هذا النزاع الي لجنة فض المنازعات والتي تم تشكيلها بعد توقيع العقد.

• وتتكون هذه اللجنة من عضو محايد يختاره المالك وآخر محايد يختاره المقاول علي أن يقوم كلا العضوين باختيار رئيساً لهذه اللجنة علي الأ يكون من جنسية المالك أو المقاول . وقرارات هذه اللجنة واجبة التنفيذ لحين عرض النزاع الصادر فيه القرار علي لجنة التحكيم واتخاذها قرار بشأن هذا النزاع .

• تكونت اللجنة من كلا:

-مستر بيير ميشيل جنتون Pierre Michel GENTON Mr. سويسري الجنسية

-مستر روهان شورلاند Mr. Rohan Shirland يوناني الجنسية

-السيد المهندس عبد الرحمن محمد شلبي رحمه الله

وقد اختير منهم مستر جنتون رئيسا للجنة.

• قام المقاول بعرض هذا النزاع علي لجنة فض المنازعات " DAB " وذلك لإصدار قرار يحدد المبالغ التي يجب أن تخضع لتطبيق معامل زيادة الأسعار .

في 26 ابريل 2006 وبعد عرض وجهتي نظر كلاً من المالك والمقاول علي اللجنة المشار اليها سواء بالمستندات والمناقشات والمرافعات الشفوية انتهت في قرارها بأغلبية الأصوات (صوتين مؤيد وصوت معارض وكان هو صوت المهندس عبد الرحمن شلبي رحمه الله) إلي أن المبالغ الواجب تطبيق معامل زيادة الأسعار عليها يجب أن تتم علي قيمة الأعمال التي تمت خلال فترة الفاتورة " المستخلص " دون إستبعاد الدفعة المقدمة المسترجعة من المقاول.

مما يعني توافق قرار لجنة فض المنازعات مع المقاول.

• وقد استند القرار عاليه الي النقاط الرئيسية الآتية:

-أنه يجب اتباع التتابع الوارد في المادة " 60.1 " من كون أن حساب مبالغ زيادة الأسعار قد وردت في الفاتورة قبل المبالغ المسترجعة من الدفعة المقدمة.

-أن إستبعاد الدفعة المقدمة من المبالغ المحسوب عنها زيادة الأسعار لا يتفق مع روح العقد وقد أحالت الي بعض نصوص في القانون المدني الفرنسي والسويسري.

-أن اللجنة تري أن المقاول لم يؤخذ في إعتباره المادة الفرعية " 70.6 " a عند تقديم عطائه وأن الإقتراحين المقدمين منه أثناء مرحلة ما قبل التفاوض والخاصة بطلب زيادة الدفعة المقدمة لم يوضحا أن المقاول قد أخذ تلك المادة في إعتباره.

-أن اللجنة تري إما إلغاء المادة " 70.6 " a أو تغيير محتواها لتصبح متضمنه حساب معامل زيادة الأسعار علي إجمالي قيمة الأعمال المنفذة خلال فترة الفاتورة " المستخلص ".

ومما هو جدير بالذكر ان السيد المهندس عبد الرحمن شلبي رحمه عضو اللجنة لم يكتف بعدم موافقه على قرار اللجنة وانما قدم قراره منفردا قى صالح المالك مؤيدا بالمستندات لاثبات وجهة نظره.

وطبقا لراى المالك فان اللجنة علي النحو عاليه قد أغفلت النقاط الرئيسية الآتية:

—أن التتابع الوارد في المادة " 60.1 " قد أورد أن حساب قيمة زيادة الأسعار سيتم طبقاً للمادة "70" والتي تضمنت التحديد الوارد في المادة " 70.6. a "

—ان اللجنة تجاهلت تماما المادة " 70.6 " a التي افردتها العقد فى تطبيق معادلة الاسعار وكانت معلومة جيداً للمقاول قبل تقديم عطائه وأنه من المؤكد أنها قد أخذت في إعتباره عند دراسة العطاء ولم يقيم المقاول أو لجنة فض المنازعات بتقديم ما يثبت عكس ذلك.

—أن هذا العقد يخضع للقانون المصري ولا مجال لتغييره أو إخضاعه للقوانين المدنية الفرنسية أو السويسرية.

—أن الأتقراحين المقدمين من المقاول خلال فترة المفاوضات بزيادة الدفعة المقدمة يظهران تماماً أنه أخذ في إعتباره إستبعاد الدفعة المقدمة المسترجعة منه من المبالغ التي سيطبق عليها معامل زيادة الأسعار.

—أنه لا يحق للجنة فض المنازعات إلغاء أو تعديل أي بند من بنود العقد الموقع بين طرفي التعاقد.

سابعاً – اعترض المالك

—طبقاً للعقد فقد قام المالك بتنفيذ قرار لجنة فض المنازعات خلال المدة التعاقدية الواجب تنفيذ القرار فيها، وفى 30 ابريل 2006 قام المالك بالإعتراض علي قرار لجنة فض المنازعات DAB وإبداء أسباب الأعتراض وذلك خلال مدة ال 28 يوماً من تاريخ إستلام القرار أي في موعد غايته (2006/05/23) وذلك طبقاً لمتطلبات العقد في المادة. " 67.3 "

—كما اعترض المالك على تاخر اللجنة فى اصدار القرار اذ كان يجب ان يصدر طبقا لمتطلبات المادة 67-3 ان يكون بعد 56 يوما من تاريخ ارسال المقاول رده فى 7 فبراير اى يجب ان الحكم لا يتاخر عن 5 ابريل 2006 وهنا اصبح الموقف غريبا فعند الخلاف بين المالك والمقاول يكون ال DAB هو الحكم والان اصبح الخلاف ليس مع المقاول فقط وانما

ايضا مع لجنة الـ DAB وعلى ذلك فان المالك يعتبر ان اللجنة قد فشلت فى اتخاذ القرار ويتمسك بحقه فى رفض القرار .

—طلب المالك البدء فى مفاوضات الحل الودى إن أمكن علي أن يتم الإنتهاء منها خلال مدة 42 يوماً من تاريخ إرسال الإعتراض علي القرار وذلك طبقاً لمتطلبات المادة " 67.4 " والمعدله بالملحق رقم " 5 " وطبعاً هذه المحاولة باءت بالفشل

ثامناً - إجراءات التحكيم

بدأت ادارة المشروع بسرعة التحرك فى اجراءات البدء فى التحكيم حفاظاً على حقوقها فى هذا الموضوع وبالرغم من عدم موافقة جهات كثيرة على السير فى اجراءات التحكيم اعتقاداً بان الحكم فى النهاية سيكون لصالح المقاول وتوفيراً لتكاليف التحكيم لاقتناعهم بان وجود عضوين من الاجانب فى اى هيئة تحكيم مما سيقصص فرص الفوز فى هذه القضية الا انه فى النهاية وبالحاح من ادارة المشروع لاعتقادها الواضح بالحق وان ما حدث فى لجنة الـ DAB كان خطأ كبيراً وليا للحقائق الواضحة حتى انها طلبت ان تلغى او تعدل المادة " 70.6 a " من شروط العقد لانه فى تصورهما انها لا تتماشى مع باقى مواد العقد فى سابقة لم تحدث من قبل لذا كان من المستبعد ان يتكرر هذا الخطأ فى التحكيم

ومع اقتناع الادارة ان هناك مخاطر فى التحكيم لا يستطيع احد ان يغفلها الا انه كان لا بد من المخاطرة وعدم ترك هذه الفرصة التى وفرها العقد حتى لا نندم على تركها وفى النهاية وافقت الوزارة على السير فى اجراءات التحكيم وذلك خلال مدة الـ 42 يوم التى حددها العقد

كما طلبت الادارة ايضا بالالتزام بتنفيذ قرار لجنة فض المنازعات " DAB " طبقاً لمقتضيات المادتين " 67.3 " و " 67.4 " لحين مراجعة قرارها بمعرفة هيئة التحكيم واتخاذ قرار نهائي بشأنها وذلك لتجنب إمكانية قيام المقاول بعرض عدم تطبيق المالك لقرار لجنة فض المنازعات علي هيئة التحكيم الأمر الذي قد يعطي المقاول الحق في صدور قرار لصالحه بما فيها اي اضرار مالية أخرى قد يدعي أنها لحقت به من جراء عدم التطبيق دون النظر في الدعوة ذاتها.

—فى 2006/5/18 وافق الأستاذ الدكتور / الوزير بالموافقة علي الإعتراض علي قرار لجنة فض المنازعات " DAB " والبدء فى إتخاذ إجراءات التحكيم.

في 2006/05/28 وافق الأستاذ الدكتور/ الوزير بمخاطبة السيد الأستاذ المستشار / رئيس هيئة قضايا الدولة بهذا الشأن.

في 2006/6/13 و 2006/07/09 تم عقد إجتماعين بين السادة هيئة قضايا الدولة وممثلي الوزارة من قطاع الخزانات وذلك برئاسة السيد الأستاذ المستشار/ رئيس هيئة قضايا الدولة والذي تم الإتفاق فيهما علي الأتي:

-البدء في إتخاذ إجراءات التحكيم من قبل الوزارة.

-البدء في إختيار عضو هيئة التحكيم من قبل الوزارة وكذا محامي الوزارة.

-إعداد مشروع اللجنة المشتركة من هيئة قضايا الدولة والوزارة وعرضها علي معالي الأستاذ الدكتور / الوزير علي أن تكون اللجنة برئاسة الأستاذ المستشار / رئيس هيئة قضايا الدولة وذلك للتحضير ومباشرة الدفاع في الدعوي والتعاون مع المحامي المختار.

في 2006/08/01 تم عقد الإجتماع الثالث مع السادة هيئة قضايا الدولة وبرئاسة الأستاذ المستشار / رئيس هيئة قضايا الدولة والتي أنتهت إلي:

-قيام هيئة قضايا الدولة بتمثيل الوزارة قانونياً في هذا النزاع.

-تعيين الأستاذ الدكتور/ حسن رضا محكماً من قبل الوزارة بعد ترشيح من الدكتور اكثم الخولى والسادة مستشارى هيئة قضايا الدولة

-إختيار الدكتور / كريم حافظ من بين عدد (5) مرشحين للعمل كمحامي عن الوزارة بناء على ترشيح د.محمد ابو العنين رئيس مركز القاهرة للتحكيم التجارى الدولى وتايد بعد ذلك من السادة مستشارى هيئة قضايا الدولة وذلك بعد اعتذار د. اكثم الخولى.

-قام المقاول بتسميه فريق المحامين للدفاع عنه من كلا من مستر إيف ديرين وبرتراند ديرين من مكتب المحاماة ديرين وشركاه والاستاذ عبد العزيز عيداروس من مكتب الشلقاني للمحاماة.

في 2006/08/31 تم إبلاغ الوزارة أنه قد تم إختيار رئيس هيئة التحكيم من قبل كل من محكم الوزارة ومحكم إتحاد الشركات (المقاول).

واصبح تشكيل هيئة التحكيم كالآتي:

1-د.بييرو بيرناردينى Prof. Piero Bernadini رئيسا

2-مستر مسيرج لازاريف Me. Serge Lzareff عضوا

3-د. حسن رضا عضوا

-في 2006/09/26 وعلي ضوء المكاتبات المتبادلة بين كل من هيئة التحكيم والممثلين القانونيين لكل من الوزارة والشركة فقد تم الإتفاق علي إجراءات التحكيم علي النحو التالي:

-قيام الوزارة بتقديم مستندات النزاع في موعد أقصاه 2006/11/27.

-قيام المقاول بالرد علي مستندات الوزارة خلال 60 يوماً من تاريخه إستلامها.

-قيام الوزارة بالرد علي مستندات المقاول خلال 21 يوماً من تاريخه إستلامها.

-قيام المقاول بالرد علي مستندات الوزارة خلال 21 يوماً من تاريخ إستلامها.

-بدء جلسات الإستماع بالقاهرة في الفترة من 17 إلي 2007/4/19.

-قيام كل من الوزارة والمقاول بتقديم ملف ملخص عن ما تم تقديمه أثناء جلسات الإستماع وذلك في موعد غايته 30 يوماً.

-قيام هيئة التحكيم بإصدار قرارها في هذا النزاع في موعد غايته 2007/08/31.

-في 2006/10/01 تم توقيع عقد الخدمات القانونية مع الدكتور / كريم حافظ المحامي وتم عقد عديد من الإجتماعات بين اللجنة المشكلة برئاسة الأستاذ المستشار / رئيس هيئة قضايا الدولة والدكتور / كريم حافظ سواء بالقاهرة أو موقع المشروع وكان آخرها 2006/11/01 وذلك لإعداد مستندات النزاع لتقديمها لهيئة المحكمة في موعد غايته 2006/11/27.

جلسات الاستماع من 17-19 ابريل 2007

استمعت هيئة التحكيم الى كلا من الشهود الذين تم تسميتهم:

اولا من قبل المالك

-السيد المهندس ابراهيم ابو النجا وكما ذكرنا في مقدمه الذي كان له دور بارز في هذه القضية اذ كان لشهادته امام هيئة التحكيم عن فترة المفاوضات مع المقاول قبل توقيع العقد ومدى تفهم المقاول عن وضع تطبيق معادلة الاسعار الاثر البالغ في الحكم الصادر.

ثانيا من قبل المقاول كلا من:

-مستر ميشيل لارج Mr. MICHEL LARGE

-مستر جيل بيتيت Mr. JOEL PETIT

-مستر جيل رولان Mr. GILLES ROLLAND

الذين حضروا مناقشات قبل توقيع العقد Pre-Award Discussion

وكانوا قد قدموا شهاداتهم مكتوبة قبل الشهاده امام المحكمه اثناء الجلسات

تم الالتزام من الطرفين بكل هذه المواعيد وتم اصدار الحكم فى 7 اغسطس 2007

قرار هيئة التحكيم

على أساس كل ما سبق،

ترى هيئة التحكيم وتعلن ما يلي:

1.تم إلغاء قرار لجنه تسوية المنازعات

(DAB Dispute Adjudication Board)لوحه الحكم على النزاع)

المؤرخ فى 26 أبريل 2006.

2.لأغراض البند الفرعي 70.6 (أ)، تنطبق صيغة تعديل الاسعار بموجب البند الفرعي 70.3 فقط على المبالغ التي يصدرها المقاول في أي فترة نصف شهرية معينة بموجب البند الفرعي 60.1 (ج)، وإذا كان ذلك ممكناً، (د) و (هـ)، يتم تطبيق هذه الصيغة بعد خصم مبلغ الدفعة المقدمة من هذه المبالغ السداد المستحق في نفس الفترة نصف الشهرية.

3.يجب على المدعى عليهم أن يدفعوا للمدعي الفرق بين جميع المبالغ التي دفعتها المدعية للمدعى عليهم على حساب تعديل الأسعار وفقاً لقرار مجلس تسوية المنازعات المؤرخ 26 أبريل 2006 والمبالغ المستحقة بشكل صحيح للمدعى عليهم وفقاً للنقطة 2 أعلاه، ويكون مبلغ هذا الفرق مساوياً، كما في 18 يونيو 2007، إلى 2.204.820,35 يورو و 19,162,456.86 جنيه مصري.

4. تسري الفائدة على أي مبالغ مستحقة على المدعى عليهم بموجب النقطة 3 أعلاه بمعدل 5 % سنويًا على النحو المنصوص عليه في المادة 226 من القانون المدني المصري، من تاريخ دفع أي من هذه المبالغ من قبل المدعي إلى المدعى عليهم وفقًا لقرار مجلس تسوية المنازعات حتى تاريخ الدفع الفعلي.

5. تم رفض الدعوى المقابلة للمدعى عليهم.

6. يتحمل كل من المدعي والمدعى عليهم تكاليفه الخاصة للتمثيل القانوني والمساعدة القانونية، بالإضافة إلى حصة بنسبة الثلث / الثلثين، على التوالي، مبلغ أتعاب المحكمين ونفقاتهم والتكاليف الأخرى للتحكيم، وهذا المبلغ يساوي 270.945.00 يورو.

وفقًا لذلك، يجب على المدعى عليهم أن يدفعوا للمدعي مبلغ 45.158,00 يورو، في غضون ثلاثين (30) يومًا من تاريخ الإخطار بقرار التحكيم هذا. في حالة التأخير، يتم احتساب الفائدة على المبلغ المذكور بالسعر المنصوص عليه في النقطة 4 أعلاه حتى تاريخ الدفع الفعلي.

7. يتم رفض جميع الطلبات والمطالبات الأخرى للأطراف.

وبهذا يكون قد تم إغلاق الستار على هذه القضية بعودة الحق إلى أصحابه

ارجو ان اكون فد وفقت فى نقل هذه الوقائع .

New Naga-Hammadi barrage
Egypt

Contract Between

Employer: - EGYPT'S MINISTRY OF WATER RESOURCES AND IRRIGATION
(MWRI)

And

Contractor: - VINCI / BILFINGER / BERGER / ORASCOM

DISSENTIENT OPINION REPORT ABOUT
DECISION-2

RE: Application Of Price Adjustment Under The Contract

[To be attached with the decision-2 and circulated to parties]

By : Dissentient DAB-MEMBER

Eng. Abdel Rahman Shalaby

CAIRO-April – 2006

New Naga – Hammadi Barrages Project
Dissentient Opinion
About decision -2 (application of price adjustment under the contract)
By: Abd - EL Rahman Mohammad SHALABY
Naga – Hammadi DAB – Member

I. Preface

Public international tender for the construction of lot-1 of the new Naga – Hammadi barrage was announced in year 2001.

Opening, evaluating and negotiating tenders/awards had been carried out during 2002-2004.

Based on the above developments an agreement and contract documents had been concluded between the parties (Employer: Egypt's ministry of water resources – contractor joint venture: VINCI / Bilfinger- Berger / Orascom).

Later, and in accordance of the contract conditions the parties had jointly appointed 3- DAB members in accordance to the relevant clauses and addendum of the contract conditions. The author is one of the three DAB members (being: two members and chairman).

In February 2006, the DAB received **Referral No. (2)** from the parties, as per the rules, clauses and agreements of concern. The referral is entitled: “application of price adjustment under the contract”.

The case was presented and discussed in accordance of the plan of the DAB and parties.

II. Dispute and parties requests from the DAB

The core of the request from the DAB was “How the price adjustment provision (clauses 60's and 70's) have to be applied in respect to price adjustment and the repayment of advance payment” (as per clause 60.7 and other clauses).

The request was considered as to take decision about the disputed position of the parties in this regard.

The contractor considers the price adjustment should be done to the bi-monthly amounts invoiced (GCC 60.1) before deduction for repayment of the portion of the advance payment (GCC 70.6). The employer considers that price adjustment should be done after deduction of the portion to be repaid from the advance payment (GCC 70.6).

III. REFERENCES, SUBMISSIONS AND REFLECTIONS OF PARTIES (BEFORE AND DURING THE HEARINGS)

1. The contract provisions (clauses 60.1-60.10 and 70.1-70.8 “invoices payments” and others until 80.2). Significant clauses to the dispute are: 60.1, 60.7, 70.1, 70.3 and 70.6.
2. Positions, submissions and responses by the contractor and the employer (including annexes, relevant correspondences, pre-award communications, hearings, written notes and copies of model invoices).

IV. DAB ANALYSIS ASSESSMENT AND SYNTHESIS

These have been done through: -

1. DAB internal discussions / deliberations
2. Review, study and assess submissions and discussions.
3. Contract framework, structure, conditions, addendum, amendments, ...etc.
 - 3.1. Separate readings, meanings and objectives of each clause.
 - 3.2. Collective / integral readings and inter-linkage of the different clauses dealing with issue as whole.
 - 3.3. Asses the contract integrity, consistency, clarity, limitation / distinctness – understanding and parties intention / awareness (as being meant by communications, minutes, negotiations, evidences ...etc.), price adjustment versus advance payment and interval of repayments, win-win issues, risks, ... etc.
4. Synthesis, evaluation and conclusions (decision).

Based on above readings, analysis and assessment the two DAB members decided that:

A-Price adjustment shall apply for the amount invoiced as per Clause (60.1) PRIOR any deductions for repayment of the advance payment.

B-The Clause (70.6 a) is to be either DELETED or modified to replace the word (AFTER) by the word (BEFORE)

The above discussions are issued by majority (two DAB members) and a separate report of DAB member in disagreement with these discussions giving reasons for disagreement is to be attached with the majority decisions.

V- DAB Member in Disagreement (Remarks, Facts and Reasonings)

The Author (The DAB dissentient Member) totally disagrees with this report and decision (in form and substant). Herein below are the reasons and justifications:

FIRST- PRINCIPLES & RULES:

1. The contract is an integral, unitary and comprehensive document effecting and interlinks different clauses in regard of interpretation and application.
2. The Contract is the bounding and enforcing Law of the parties.
3. There is no personal interpretation / judgment / jurisprudence or conclusion wherever a text or provision exist
4. The Contract had approved, agreed upon by **Egyptian State Council**, signed by parties and any amendment and / or interpretation is solely through the state council (clause 82.2) and the agreed upon and will of the parties (and not in DAB'S Capacity).
5. Any changes (by any mean) in the contract clauses (related to payments and financial issues) will violate and breach the equality of opportunities and effect the ranking of the bidders.
6. Any changes or new development and / or personal interpretation for any clause / clauses will induce nullification, breaching and crippling consequences/effects.

Second- Contract Specific Issues:

1. The Contract is not FIDIC Model, but specially tailored and framed Contract to suit in the project and parties balanced obligations / benefits.
2. The DAB members went beyond / surpass the request of parties (How the price adjustments and advance payment are conducted in pursuant to the conditions of the clauses 70.6 and 60.1 during the second phase/approach of repaying the advance payment (during the 30% - 80% of the contract price) and which is intentionally connected with the full and direct wording and meaning of clause 70.6. Instead the DAB members resorted to their own interpretation of inconsistency, ambiguity... etc. to give unjustified reasons for the clause amendments / changes or adaptation (which again is the parties will and approval/ objections of the State Council (the only authorized body).

Third – Important issue in the contract Framework/ Sprit/ Nature

1. Careful readings and assessment of the overall contract documents reveal its integrity, consistency, clarity and fair applicability and soundness
2. The communicated letters, minutes of negotiations, alternatives for the % ge of the advance payments and savings calculations (based on direct meaning of clause 70.6 and the general sequence and timely and framed items of clause 60.1) prove the clarity and well-known intentions of parties.
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Fourth – Important notices/ remarks during the hearings and parties written notes

1. Many issues, clarifications, mathematical/arithmetical calculation for invoicing, based on applications of GCC 60.1 and GCC 70.6 (and others), were presented by parties. Some were coherent; other's not (Flawed) and wrong applications.
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3. The pre-award discussions, communications, enquiries, same views of intent and interpretations of the contract.
4. The advance payment is not subject to price adjustment; the employer is recovering it, as it was granted (free interest and inflation).
5. Historical developments were recalled:-
 - (i) Tendering in mid year 2000 with clause 70.6 (limitations)
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5. Clause 60.1 (bi-monthly invoices) is well implemented in a dynamic and evolutionary way through the specific clauses (highlighted in the items of the this clause) and harmonized with clauses 70's (70.1 – 70. 8).
6. The dissentient feels that all this issues/facts/illustrations were not well considered assessed and evaluated by the DAB (Majority) report.

FIFTH – selected issues raised in the decision assessment and determinations:

1. **Items f – 2** of DAB analysis (contract framework) based on FIDIC framework and context, is not at all applicable to the concerned contract, simply because it's specially prepared, negotiated and tailored contract, and nothing should be connected or interpreted by such infused similarity or comparison. The same is for items 36, 37 and 38 (FIDIC and international).
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4. The explanations, interpretation and justification illustrated in items from 45 to item 54 are baseless, proof and certainty but rather based on personal judgment, arguments, and information based on assumptions such as: seemingly, sufficient evidence, justify validity, true intentions, FIDC, inconsistency, absence of reactions, ... etc.

The careful readings, assessment and evaluation of the methodology and preparations are target to lead/prove/convince that the GCC 70.6 is erroneous, not commonly intended, non-standard and hence should be omitted or reversed to (BEFORE instead of AFTER), nevertheless of any justifications regarding this clause (e.g. amending clause 70.1 and other balanced and justified reasonings), which are professionally absurd, faulty and defective.

5. Items S5 - S9 concerning legal consideration are totally unjustified or could be discussed or accepted or even considered due the following reasons:

1. There is no legal defect or error (but rather application of condition of contract clauses which are integral, consistent and clear.
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1. It was expected that the decision study, analysis and evaluation would consider different approaches/orientations and outweighing (most probable), but instead the focus was channelled towards the way and means of casting doubts / discredit of the relevant Clauses to cripple and annul its efficacy which is an abrogation and breaching of the contract, while excluding the will and consent of the two parties and the power of the Law of Contract and the commitments of the parties persuade to the contract documents.
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 - (iv) Instruction to tenderers (items 3.3 – interpretation and clarifications of tender document, and item 3.5.4 price adjustment, and items 5.2, 5.3 Evaluation of offers).

3. It's worth mentioning that careful readings of the above contract related documents and the in the depth understanding of GCC 60.1 and GCC 70 (70.1-70.8, specially 70.6) will correctly and objectively lead to the correct and constructive decision.

Consequently, and by the virtue of the above contractual facts, and dispute assessment, it is to be concluded that sub clause 70.6 is not at all erroneous, but rather correct and relevant, and hence the decision is defective, I hate to say erroneous and I'm in disagreement with the DAB report and reject to sign it.

DAB - Member
Abd-EL Rahman Mohammed SHALABY

Cairo – April 2006



جمهورية مصر العربية

وزارة الموارد المائية والري
الوزير

قرار وزاري
رقم ٤٢ لسنة ٢٠٠٦
بتاريخ ٩/٩/٢٠٠٦

وزير الموارد المائية والري:

- ** بعد الإطلاع علي الدستور.
- ** وعلى الاختصاصات والسلطات المخولة لنا بمقتضى القوانين واللوائح..
- ** وعلى القانون رقم ٤٧ لسنة ١٩٧٨ الصادر بنظام العاملين المدنيين بالدولة.
- ** وعلى كتاب المستشار رئيس هيئة قضايا الدولة الوارد لنا برقم ١٩٦ بتاريخ ٢٠٠٦/٧/١١ بشأن تشكيل لجنة مشتركة للدفاع في القضية التحكيمية أمام مركز القاهرة الإقليمي للتحكيم التجاري الدولي
- ** ومراعاة لمقتضيات الصالح العام.

قرر:

المادة الأولى:

تشكيل لجنة الدفاع في القضية التحكيمية بين وزارة الموارد المائية والري (مشروع قناطر نجع حمادى الجديدة) واتحاد الشركات (فينسى الفرنسية - بلفنجر الألمانية - أوراسكوم المصرية) برئاسة الأستاذ المستشار / ميلاد سيدهم - رئيس هيئة قضايا الدولة وعضوية كل من :-

(أ) عن هيئة قضايا الدولة:

النائب الأول لرئيس هيئة قضايا الدولة
نائب رئيس هيئة قضايا الدولة
عضو قسم المنازعات الخارجية

- ١- الأستاذ المستشار / صدقي عبد الرحمن خلوصي
- ٢- الأستاذ المستشار / حسين مصطفى فتحى
- ٣- النائب / أحمد سعد محمود

(ب) عن وزارة الموارد المائية والري:

رئيس قطاع الخزانات والقناطر الكبرى
رئيس الإدارة المركزية - المهندس المقيم للمشروع
مدير عام التنفيذ - نائب المهندس المقيم
مدير عام الأعمال الهيدروميكانيكية
كبير مهندسي الأعمال بالمشروع
المسح

- ١- المهندس / حسين محمد على عثمان
- ٢- المهندس / محمد عبد العال سيد
- ٣- المهندس / أحمد حسن عبد الجابر
- ٤- المهندس / إبراهيم على أبو النجا
- ٥- المهندس / أحمد محمد إبراهيم كرات
- ٦- السيد الدكتور / حسن أحمد رضا

وللجنة ان تختار من بين أعضائها مقررأ لها ... وتقوم هذه اللجنة بإعداد كافة الأوراق والمستندات والمذكرات اللازمة للدفاع في القضية التحكيمية.

بسم الله الرحمن الرحيم



جمهورية مصر العربية

وزارة الموارد المائية والري

الوزير

٩٩٢
٧٩١٩٢المادة الثانية :

يصرف لكل من رئيس وأعضاء لجنة الدفاع المشكلة بالقرار الوزاري هذا بدل حضور جلسات بواقع ٤٠٠ ج (فقط أربعمائة جنيه) عن كل جلسة وبدل انتقال ثابت بواقع ٢٠٠ ج (فقط ثلاثمائة جنيه) عن كل جلسة وذلك بخلاف المستحقات المقررة لكل منهم بمقتضى القوانين أو اللوائح أو العقود المبرمة في هذا الشأن عدا السادة أعضاء اللجنة المرشحين من قبل جهات وزارة الموارد المائية والري والمذكورين بالمادة الأولى (ب) من رقم (١) إلى رقم (٥).

المادة الثالثة :

تشكيل الأمانة الفنية للجنة من كل من :-

١ - السيدة/ نادية حسن على.

٢ - السيدة/ وفاء أحمد عزت

وتصرف لكل منهما بدل حضور جلسات بواقع ١٥٠ ج (فقط مائة وخمسون جنيه) عن كل جلسة وبدل انتقال بواقع ٥٠ ج (خمسون جنيه) عن كل جلسة.

المادة الرابعة :

يعمل بهذا القرار اعتباراً من تاريخ صدوره ، وتخطر كافة الجهات المعنية بصورة منه للعمل بموجبه.

وزير

الموارد المائية والري

(٥ / محمود أبو زيد)

٢٧ / ٨ / ٢٠٠٦

ج- قرار لجنة DAB

DISPUTE ADJUDICATION BOARD
NEW NAGA HAMMADI BARRAGE PROJECT – ARAB REPUBLIC OF EGYPT

8/501/171
C-7/0/9

Abdel R. M. Shalaby
(Member)

Pierre M. Genton
(Chairman)

Rohan Shorland
(Member)

Address:

Pierre M. Genton
Chairman of the DAB
72, rue du Centre
1025 Lausanne/St-Sulpice
Switzerland
tel. +41-21-695 24 40
fax +41-21-695 24 44

✓ - Ministry of Water Resources & Irrigation
(MWRI –RGS)
Att. Eng. Hassan M. A. Osman and
Eng. Mohamed Abd Aal

- Vinci Construction Grands Projets, Bilfinger
Berger and Orascom Construction Industries
Att. Mr. Sylvestre Guillen

Lausanne, 29 April 2006

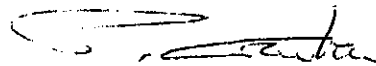
DAB New Naga Hammadi Barrage Project
Referral No 2 (Application of Price Adjustment under the Contract)

Dear Sirs,

With reference to the last Site visit of March 2006 and to my e-mail sent to the Parties on April 26, 2006, please find attached the hard copies of

1. The Decision related to Referral No. 2 signed by two DAB Members
2. The Dissenting Opinion related to Referral No.2 signed by one DAB Member.

Yours faithfully



Pierre M. Genton
Chairman of the DAB

Copy to :
- Eng. Abdel Rahman Shalaby
- Eng. Rohan Shorland

السيد المهندس / السيد / السيد
المكتب الفني
C-7/0/9

11.22
C-7/0/9

NEW NAGA HAMADI BARRAGE AND HYDROPOWER PLANT

CONTRACT
BETWEEN

MINISTRY OF WATER RESOURCES AND IRRIGATION
OF THE ARAB REPUBLIC OF EGYPT

AND

VINCI CONSTRUCTION GRANDS PROJETS / BILFINGER BERGER AG /
ORASCOM CONSTRUCTION INDUSTRIES JOINT VENTURE

DECISION N° 2 **RE. "APPLICATION OF PRICE ADJUSTMENT** **UNDER THE CONTRACT"**

APRIL 2006

THE DISPUTE ADJUDICATION BOARD

Eng. A. M. Thalaby
(Board Member)

Eng. Pierre M. Genton
(Chairman)

Eng. Rohan Thorland
(Board Member)

New Naga-Hammadi barrage
Egypt

Contract Between

Employer: - EGYPT'S MINISTRY OF WATER RESOURCES AND IRRIGATION
(MWRI)

And

Contractor: - VINCI / BILFINGER / BERGER / ORASCOM

DISSENTIENT OPINION REPORT ABOUT
DECISION-2

RE: Application Of Price Adjustment Under The Contract

[To be attached with the decision-2 and circulated to parties]

By : Dissentient DAB-MEMBER

Eng. Abdel Rahman Shalaby

CAIRO-April – 2006

New Naga – Hammadi Barrages Project
Dissentient Opinion
About decision -2 (application of price adjustment under the contract)
By: Abd - EL Rahman Mohammad SHALABY
Naga – Hammadi DAB – Member

I. Preface

Public international tender for the construction of lot-1 of the new Naga – Hammadi barrage was announced in year 2001.

Opening, evaluating and negotiating tenders/awards had been carried out during 2002-2004.

Based on the above developments an agreement and contract documents had been concluded between the parties (Employer: Egypt's ministry of water resources – contractor joint venture: VINCI / Bilfinger- Berger / Orascom).

Later, and in accordance of the contract conditions the parties had jointly appointed 3- DAB members in accordance to the relevant clauses and addendum of the contract conditions. The author is one of the three DAB members (being: two members and chairman).

In February 2006, the DAB received **Referral No. (2)** from the parties, as per the rules, clauses and agreements of concern. The referral is entitled: "application of price adjustment under the contract".

The case was presented and discussed in accordance of the plan of the DAB and parties.

II. Dispute and parties requests from the DAB

The core of the request from the DAB was "How the price adjustment provision (clauses 60's and 70's) have to be applied in respect to price adjustment and the repayment of advance payment" (as per clause 60.7 and other clauses).

The request was considered as to take decision about the disputed position of the parties in this regard.

The contractor considers the price adjustment should be done to the bi-monthly amounts invoiced (GCC 60.1) before deduction for repayment of the portion of the advance payment (GCC 70.6). The employer considers that price adjustment should be done after deduction of the portion to be repaid from the advance payment (GCC 70.6).

III. REFERENCES, SUBMISSIONS AND REFLECTIONS OF PARTIES (BEFORE AND DURING THE HEARINGS)

1. The contract provisions (clauses 60.1-60.10 and 70.1-70.8 "invoices payments" and others until 80.2). Significant clauses to the dispute are: 60.1, 60.7, 70.1, 70.3 and 70.6.
2. Positions, submissions and responses by the contractor and the employer (including annexes, relevant correspondences, pre-award communications, hearings, written notes and copies of model invoices).

IV. DAB ANALYSIS ASSESSMENT AND SYNTHESIS

These have been done through: -

1. DAB internal discussions / deliberations
2. Review, study and assess submissions and discussions.
3. Contract framework, structure, conditions, addendum, amendments, ...etc.
 - 3.1. Separate readings, meanings and objectives of each clause.
 - 3.2. Collective / integral readings and inter-linkage of the different clauses dealing with issue as whole.
 - 3.3. Asses the contract integrity, consistency, clarity, limitation / distinctness – understanding and parties intention / awareness. (as being meant by communications, minutes, negotiations, evidences ...etc.), price adjustment versus advance payment and interval of repayments, win-win issues, risks, ... etc.
4. Synthesis, evaluation and conclusions (decision).

Based on above readings, analysis and assessment the two DAB members decided that:

A-Price adjustment shall apply for the amount invoiced as per Clause (60.1) PRIOR any deductions for repayment of the advance payment.

B-The Clause (70.6 a) is to be either DELETED or modified to replace the word (AFTER) by the word (BEFORE)

The above discussions are issued by majority (two DAB members) and a separate report of DAB member in disagreement with these discussions giving reasons for disagreement is to be attached with the majority decisions.

V- DAB Member in Disagreement (Remarks, Facts and Reasonings)

The Author (The DAB dissentient Member) totally disagrees with this report and decision (in form and substant). Herein below are the reasons and justifications:

FIRST- PRINCIPLES & RULES:

1. The contract is an integral, unitary and comprehensive document effecting and interlinks different clauses in regard of interpretation and application.
2. The Contract is the bounding and enforcing Law of the parties.
3. There is no personal interpretation / judgment / jurisprudence or conclusion wherever a text or provision exist
4. The Contract had approved, agreed upon by **Egyptian State Council**, signed by parties and any amendment and / or interpretation is solely through the state council (clause 82.2) and the agreed upon and will of the parties (and not in DAB'S Capacity).
5. Any changes (by any mean) in the contract clauses (related to payments and financial issues) will violate and breach the equality of opportunities and effect the ranking of the bidders.
6. Any changes or new development and / or personal interpretation for any clause / clauses will induce nullification, breaching and crippling consequences/effects.

Second- Contract Specific Issues:

1. The Contract is not FIDIC Model, but specially tailored and framed Contract to suit in the project and parties balanced obligations / benefits.
2. The DAB members went beyond / surpass the request of parties (How the price adjustments and advance payment are conducted in pursuant to the conditions of the clauses 70.6 and 60.1 during the second phase/approach of repaying the advance payment (during the 30% - 80% of the contract price) and which is intentionally connected with the full and direct wording and meaning of clause 70.6. Instead the DAB members resorted to their own interpretation of inconsistency, ambiguity... etc. to give unjustified reasons for the clause amendments / changes or adaptation (which again is the parties will and approval/ objections of the State Council (the only authorized body).

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Consequently, and by the virtue of the above contractual facts, and dispute assessment, it is to be concluded that sub clause 70.6 is not at all erroneous, but rather correct and relevant, and hence the decision is defective, I hate to say erroneous and I'm in disagreement with the DAB report and reject to sign it.

DAB - Member
Abd-EL Rahman Mohammed SHALABY

A. M. Shalaby

Cairo – April 2006

A. INTRODUCTION

1. The Contract Lot 1 related to the Civil Works of the NEW HAGA HAMMADI BARRAGE AND HYDRPOWER PLANT was signed on the 01 June 2002 between

- the Ministry of Water and Resources and Irrigation of the Government of the Arab Republic of Egypt, hereinafter called "the Employer" and
- the Joint Venture made of (i) Vinci Grands Projets (France), (ii) Bilfinger Berger AG (Germany) and (iii) Orascom Construction Industries (Egypt), hereinafter called "the Contractor".

The signing of the Contract was preceded by a letter of intention sent by the Employer on 12 May 2002 indicating his intention to accept the tender of the Contractor. In the Contract (Addendum No 5 to Volume 2 under chapter 5.3.8, art. 67), the Parties have agreed to refer any matter in dispute to a Dispute Adjudication Board (DAB) for a Decision.

2. The Dispute Adjudication Board Agreement was signed by the Parties and the DAB Members on 05 December 2004 during the first site visit. The Dispute Adjudication Board is made of three members, each of them being approved by both Parties:

- Eng. Abdul Rahman Shalaby, Egyptian citizen, proposed by the Employer;
- Eng. Rohan Shorland, Australian citizen, proposed by the Contractor;
- Eng. Pierre M. Genton, Swiss citizen, proposed by Eng. Shalaby and Eng. Shorland and acting as chairman of the DAB.

3. During the fifth Site Visit 13-15 December 2005, when fixing the date of the next site visit, the DAB was already informed of the intention of the Contractor to file a formal referral for a DAB's Decision in accordance with the Addendum No. 5 to the General Conditions of Contract (GCC 67.3). This referral No 2 entitled "Application of price adjustment under the Contract" is an issue related to the interpretation of the contract clauses.

4. The Referral sent by the Contractor was received by the DAB on 07.02.06 and refers to the Employer's Decision dated 27.11.2005. The Contractor's notification of his dissatisfaction was given on 29.11.2005 in accordance with GCC 67.1. The response of the Employer was received on 02.03.2006. By e-mail dated 20.02.2006, the DAB confirmed its acceptance of the referral and the validity of the dispute in accordance with Addendum No. 5 (GCC 67.3). The deadline for the latest issuance of the Decision is on 27 April 2006 (56 days after the date of reception by the DAB).

5. The Parties presented their case during a hearing held on 13 and 14.03.06 on the site in Naga Hammadi. Both Parties were given the possibility to respond to the statements of the other Party, to present all their argumentation and to answer the clarifications sought by the DAB. At the request of the DAB, both Parties confirmed at the end of the hearing to have been offered the opportunity to be fully heard by the DAB.

6. The members of the DAB have studied separately the submission received on 07.02.06 and the response on 02.03.06. The DAB met first in Luxor on 12.03.06 for preparing the hearing and then in Cairo on 16.03.06 for the preliminary deliberation of its Decision. In order to finalise its determination, the DAB met again in Cairo on 11 to 13 April 2006.
7. The following chapters contain the justification of the determination made by the majority of the DAB members. The opinion of the DAB dissenting member is detailed in a separate report sent together with Decision No. 2.
8. The following documents have been received:
 - a. Referral by the Contractor dated 02.02.06 received on 07.02.06 by the DAB including
 - The written opinions of the Contractor dated 17.10.04/29.06.05/01.10.05
 - The written opinions of the Consultant dated 20.10.04/21.08.05 (2)
 - The written opinion of the Employer dated 10.11.04
 - The request by the Contractor for an Employer's Decision dated 20.10.05
 - The notice of the Employer's Decision dated 27.11.05
 - The notice of disagreement of the Contractor to the Employer's Decision dated 29.11.05
 - b. Response of the Employer dated 02.03.06 was sent by fax and e-mail and received on the same day by the DAB.
 - c. Various exhibits tabled by both Parties during the Hearing.

B. THE DISPUTE

9. The dispute between the Parties relates to the application of the price adjustment formulae. The Contractor is of the view that it should be applied on the value of the works prior to any deduction for the advance payment, while the Employer defends the view that it should be done after. The consequences have been assessed by the Contractor to some € 1.5 million and EGP 13 million and could reach about € 2million and EGP 17 million, according to the Contractor.
10. The following typical and hypothetical example may illustrate the issue in dispute and the financial impact at stake:

Activities		Comments
<u>The Contract</u>		
- Contract price	€ 100,000,000	
- Duration	2 years	
- Advance payment	15% or € 15,000,000	
- Repayment advance	after 1 year	
- Payment of works	50% or € 50,000,000	
- Price adjustment	5% per year on works performed	

<u>Position of the Contractor</u>	€ 15,000,000	
- advance received by the Contractor	€ 50 m (1+5%) – 15 m =	
- payment after 1 year	€ 37,500,000	
- Payment after 2 years	€ 50 m (1+5%) =	
- Total	€ 52,500,000	
	€ 105,000,000	Price adjustment represents 5,00%
<u>Position of the Employer</u>		
- advance received by the Contractor	€ 15,000,000	
- payment after 1 year	€ (50 m – 15 m) (1+5%) =	
	€ 36,750,000	
- Payment after 2 years	€ 50 m (1+5%) =	
	€ 52,500,000	
- Total	€ 104,250,000	Price adjustment represents 4,25%
Difference between Contractor's and Employer's positions	€ 750,000	

C. OVERALL POSITIONS OF THE PARTIES

11. The positions summarised hereafter do not reflect in their entirety the statements made by the Parties and cannot be considered exhaustive. The detailed arguments presented by either Party in their written submissions, in their presentations and in their responses to the clarifications asked by the DAB are summarised and discussed in chapter F (DAB Analysis).

- Position of the Contractor

12. The Contractor is of the view that the Price Adjustment should apply “... to the amount of the invoice for the bi-month as stipulated by GCC 60.1, before deduction of the repayment of the Advance Payment (item (i)), in accordance with the sequence of the items.”

The Contractor does not dispute the wording of GCC 70.6 (“Price adjustment will only be made to the amounts ... after deduction of the portion of the Advanced payment...”), but considers that the application should consider all invoices (bi-monthly invoices including the invoice for the advance payment) and therefore rejects an application of GCC 70.6 (a) as made by the Employer.

- Position of the Employer

13. The Employer is of the opinion that “ ... there are no other clauses in the Contract which takes precedence over the application of Clause 70.6 (a) of the CoC.”. GCC 70.6 (a) stipulates that Price Adjustment should apply “... to the amount of the invoice for the bi-month as stipulated by GCC 60.1, after deduction of the repayment of the Advance Payment (item (i)).” Therefore requests a strict application of GCC 70.6.

The Employer emphasises that “... the Contractor demonstrated the same understanding of the intent of the Contract at the pre-award stage by his statements”

concerning the indirect savings that the Employer would have made in the event that the Contractor's proposal to increase the Advance and defer its repayment had been accepted."

D. DECISION REQUESTED BY THE PARTIES FROM THE DAB

14. The issue on which the DAB has been asked to formulate his Decision is whether the Price Adjustment should be applied **before or after** the repayment of the Advance Payment. The questions asked by the Contractor and the confirmation requested by the Employer are:

"How the price adjustment provisions have to be applied?" (Contractor's letter 02.02.06).

"The correct interpretation of Clause 70.6 (a) of the Conditions of Contract is that the amounts reflecting changes in cost and legislation and subject to the application of the price adjustment formulae, pursuant to Clause 70, are to be adjusted by the deduction of amounts representing the value of repayments of the Advance Payment.

"The procedure presently adopted by the Employer whereby, in the bi-monthly invoices that include repayments of the Advance Payment that are credited to the Employer, the corresponding values of such repayments (in local and foreign currency) are deducted from the amounts subject to price adjustment prior to the application of the adjustment formulae, is in conformity with the Contract." (Employer's brief 02.03.06)

15. Upon the request of the DAB to simplify the understanding of everybody, the Parties agreed that their question/confirmations could be read by the following sole question:

"How Clauses 60 and 70 shall be operated in respect of Price Adjustment and in particular as regards the reimbursement of the Advance Payment?"

E. THE CONTRACT REFERENCES

16. The relevant Contract references for this issue mentioned by the Parties are the clauses under the headings "Invoices and Payment" - GCC 60.1 to 60.10 and "Changes in Cost and Legislation" GCC.70.

17. The relevant clauses related to "Invoices and Payment" to which the Parties refer are:

- GCC 60.1 (Bi-monthly invoice): *"The Contractor shall submit an invoice... in a tabulated form approved by the Employer, showing the amounts to which the Contractor considers himself entitled. The invoice shall include the following items, as applicable, which shall be taken into account in the sequence listed:*
 - a. *The estimated value of the Temporary and Permanent Works executed up to the end of the bi-month period in question ...at base rates and prices*
 - b. *The actual value approved for payment for payment for the Temporary and Permanent Works executed up to the end of the previous bi-month period ...*

- c. *The estimated contract value ... of the Temporary and Permanent Works for the bi-month in question, obtained by deducting (b) from (a)*
 - d. *The value of any variation ...*
 - e. *Amounts approved in respect of Day Work ...*
 - f. *Amounts reflecting changes in cost and legislation, pursuant to Clause 70 ...*
 - g. *Any credit and debit ... in respect of materials and Plant ...*
 - h. *Any amount to be withheld under the retention provisions ...*
 - i. *Any amount to be deducted as repayment of the Advance Payment under the provision of Sub-Clause 60.7.*
 - j. *Any other sum ...to which the Contractor may be entitled under the Contract."*
- GCC 60.7 (Advance Payment): *"The Employer will make an interest-free Advance Payment, against invoice, to the Contractor exclusively for the costs of mobilisation in respect of the Works in an amount equivalent to 15% of the Contract Price..."*
18. The relevant sub-clauses of GCC 70 related to "Changes in Costs and Legislation" to which the Parties refers are
- GCC 70.1 (Price adjustment): *"The amounts payable to the Contractor.... shall be fixed until the start of the first bi-monthly period following the three(3) years period after the latest date of the Tender validity. Thereafter, the payable amounts shall be adjusted in respect of the rise or fall in cost of general inputs*
 - GCC 70.1 amended by item 5.3.11 of Addendum No 5 (August 2001): *"The amounts payable to the Contractor... shall be adjusted, in respect of rise or fall in the cost of general inputs to the construction works ... by applying the formulae prescribed in Sub-Clause 70.3 hereafter."*
 - GCC 70.3 (Adjustment Formulae) states that the factor P_n has *"... to be applied to the amount ... determined in accordance with Sub-Clause 60.1 (c), and with Sub-Clauses 60.1 (d) and (e) ..."*
 - GCC 70.3 (Adjustment Formulae) refers to Volume 6, Part IV, Data Sheet 20 which defines the sources of indices and the weightings of the various factors (labour and costs, cement and cementitious materials, steel and other materials, equipment and lubricants).
 - GCC 70.5 (Base, Current and Provisional Indices): *"The base costs indices shall be those prevailing on the first day of the calendar month following the three (3) years period after the latest day of validity of the Contract..."*
 - GCC 70.5 amended by item 5.3.12 of Addendum No.5 (August 2001): *"the three (3) years period after the latest date of validity of the Tenders " is replaced by "the calendar month on which the validity date of the RFO expires."*
 - GCC 70.6 (a) - Limitation for Price adjustment: *" Price adjustment will only be made to the amounts invoiced by the Contractor after deduction of the portion of the Advance Payment to be credited by the Contractor";*

19. For the purpose of the forthcoming analysis on the GCC 70.6 (a), it is worthwhile recalling the standard FIDIC Conditions of Particular Application (CPA) art.70.1,

"(a) Adjustments to the Contract Price in respect of rise and fall in costs shall be calculated for each monthly statement ... if there shall be any changes in the following Index figures ... by...

"(b) For the purpose of this Sub-Clause

(i) "Base Index figure" means ...

(ii) "Current Index figure" shall mean...

(iii) "Effective value shall be the difference between (a) the amount is due to the Contractor ... less the amounts for adjustments under Clause 70".

F. DAB ANALYSIS

F.1 The approach used by the DAB

20. The dispute submitted to the DAB is a matter of contract interpretation. The law applicable is the law of the Contract (Contract documents), provided the content of the Contract documents does not contradict the applicable substantive law which is Egyptian law. This issue being complex and many arguments having been developed by the Parties, the DAB selected the following approach for building up its Decision and for responding to the Parties' arguments:

- Step No.1: Recalling the Contract framework;
- Step No.2: Reading each clause independently and identifying the meaning and ambiguities, if any, for each clause;
- Step No.3: Reading the clauses together and identify possible inconsistencies;
- Step No.4: Considering alternate meanings in case no satisfactory answer can found and testing them with the Contract and looking outside of the Contract, if still no satisfactory meaning can be determined within the terms of the Contract.

F.2 Contract Framework

21. The Contract signed by the Parties is a Bill of Quantities (BOQ) Contract based on the Standard FIDIC Conditions of Contract and mainly on the General Conditions of Contract (GCC). Only a few clauses have been amended. It is therefore worthwhile recalling the spirit of FIDIC Red Book 1987/1992, which aim is basically to tender with balanced conditions of contract and to limit the risks borne by the Contractor, thus enabling the Employer to obtain a comparable basis for selecting the contractor and more importantly to obtain a low and attractive pricing. The justification of this preliminary view can be found in the introduction of the Guide to the Use of FIDIC Conditions of Contract for works of civil engineering construction – Forth Edition, p.17:

"The use of standard conditions will not only facilitate the successful completion of the contract but will, in all probability, result in lower tender prices, as tenderers will be familiar with the conditions that will apply under the contract. This implies that they will not need to make financial

provisions for contract conditions with which they are not familiar and whose consequences they may have difficulty in assessing."

22. Usually the General Conditions remain untouched and any requirement specific to a particular project is dealt with in the Conditions of Particular Application (CPA), which allows individual drafting to suit particular local conditions. The reason is that any amendment of GCC, which have been already used over decades all around the world, may introduce contradictions and endanger the workability of the contract without deliberate intention. In the particular case of Naga Hammadi Barrage Project, the Employer decided to amend the GCC by adding new clauses to the standard GCC 70 and later amending certain of them. While the Employer was obviously free to amend the standard General Conditions, the DAB considers that it is not an easy task and is therefore not surprised that such amendments gave rise to differences in interpretation between the Parties.
23. The analysis has therefore to cautiously consider the various modifications of the Standard FIDIC Conditions of Contract and additional clauses made by the Parties before signing the Contract by the Parties and to clarify their real intention. The DAB notes namely that a bi-monthly invoicing system has been selected, a different timing for payment has been required and 7 new articles were added in GCC 70, more specifically GCC 70.6 called "*Limitation for price adjustment*".

F.3 "Individual" interpretation of the Contract Clauses

24. **Meaning of GCC 60.1.** The sequence of items listed in this Clause to be included in the invoice is used by both Parties to justify their respective positions.
25. **The Contractor** considers that the deduction of the advance payment under GCC 60.1, item (i) follows the price adjustment under item (f) and that this sequence confirms the Contractor's point of view that the deduction of the advance payment has to be made after the addition of the price adjustment. He notes that the Employer's Consultant did at a certain stage accept the idea of an apparent contradiction in GCC 60.1 and suggested to modify the sequence of items of GCC 60.1.
26. **The Employer** considers that GCC 60.1, item (f) refers to Clause 70 and therefore to GCC 70.6 (which stipulates the price adjustment after the deduction of the advance payment). Moreover item (i) concerning deduction of repayments precedes item (j) related to other sum is to be added. The Employer confirmed that the application does not run counter the provisions of GCC 60.1 (Response, p.8).
27. **The DAB** is of the view that there is no ambiguity in GCC 60.1. The key features are that GCC 60.1 provides
 - (i) A list of items to be included, as applicable, in the bi-monthly invoice. There is an indication that all of the items will not necessarily be available for inclusion in all invoices (such as no day works in a given bi-monthly period).
 - (ii) A sequence in which the items shall be taken into account in the invoice. The sequence, by use of the word "*shall*", has been given the force of a contractual requirement. The application of the sequence provided for in this clause has the

effect that repayments of the advance payment are deducted from the amounts due after the addition of the price adjustment.

28. The DAB is not convinced by the arguments presented by either Party in respect of the sequence: the reason is that GCC 60.1 to 60.8 defines only the mechanism of invoicing and payment (see the overall title). Concerning GCC 60.1 (j), the meaning of "other sum" is understood as an amount due on a current basis which does not need a price adjustment. If the sum is directly or indirectly related to the BOQ rates and subject to price adjustment, this sum would then be included either in item GCC 60.1 (a), (b) or (c). The DAB is therefore of the view that no conclusions can be drawn from the sequence indicated in GCC 60.1.
29. **Meaning of GCC 70.6 (a).** The wording of this Clause stipulates that price adjustment will only be made to the amounts invoiced by the Contractor after deduction of the portion of the advance payment to be credited by the Contractor.
30. The Contractor submitted that there is no ambiguity between GCC 70.6 (a) and the sequence in GCC 70.1 "...the portion to be credited..." does not refer to item (i) of the sequence listed (Referral, p.3). The Contractor claims " ...the confusion that has resulted from the wording of relevant clauses ..." and "... the lack of clarity of the Contract ..." (Referral p.6, § 4, 6). The Contractor furthermore notes the apparent contradiction by the fact that the Employer's Consultant proposed on 24.10.2004 "... to modify the sequence of items in Sub-Clause 60.1...".
31. The Employer considers that the Contract "makes provision for adjustment to invoices" (Response, p. 5, § 1.8), but that the extent of such adjustment is limited by GCC 70.6 "Limitation for Price Adjustment" as indicated in the title. The principle of calculation and this limitation was accepted by the Contractor and should have been considered by the Contractor in establishing its pricing. Consequently the Employer does not accept the interpretation of the Contractor and considers GCC 70.6 (a) applicable without restriction (Response, p.10, item 4.2.11).
32. The DAB is of the view, in case that price adjustment would be applicable only after 3 years, that the advance payment would have been fully repaid. The meaning of GCC 70.6 (a), if read alone and without any other consideration, appears not ambiguous: the price adjustment has to be made after the deduction of the portion of the Advance Payment. The word "only" emphasises this understanding. The wording "limitation" used in the title is understood by the DAB as a reference to the starting date of the price adjustment as indicated in GCC 70.1 and GCC 70.5, amended later on by Addendum No 5. The DAB does not consider this wording as an overall limitation.

However, as it will be discussed in the following paragraphs, as the meaning of the wording of GCC 70.6 (a) is contested by the Contractor, another issues arise concerning

- (i) the consistency and workability of this clause in relation with other Contract clauses and
- (ii) whether the wording of GCC 70.6 reflects the real intention of the Parties as referred in the submissions by both Parties (Contractor p.6, last paragraph, Employer p.5/6) and in the Hearing.

33. Meaning of the wording related to "invoice", credit", "deduction" and "portion". The Parties developed an argumentation on the meaning of these terms in GCC 60.1 and 70.6 (a) in order to demonstrate the prevailing clause and to justify their respective position. The Contractor refers to the expression "*to be credited*" instead of "*repayment*" and "*portion to be credited*" (Referral p.3, item 2), which does not refer to item (i) in the sequence of GCC 60.1. The DAB does not see, if read alone, any ambiguities or inconsistency or contradiction in the wording used. The discussion on these wordings looks rather artificial, as each clause of the General Conditions of Contract has its specific purpose. This view will be developed further in the following chapters.
34. Meaning of 15% in adjustment formulae. The Contractor refers to the neutralisation of 15% in the adjustment formulae as "*... another confirmation of the fairness of this application of Price Adjustment.*" (Referral, p.6, § 2). The Employer does not consider this observation as relevant (p.11, item 4.4.1). The DAB considers that the 15% in the adjustment formulae is quite a usual figure and covers exclusively the mobilisation costs (GCC 60.7) and cannot be linked to GCC 70.6 (a). Neither the notion of fairness in a contract (which has not been developed by the Parties), nor the reference to the interest free Advance Payment seem relevant in connection with the application of GCC 70.6 (a).

F.4 "Combined" interpretation of the Contract Clauses

35. Priority of Contract documents/clauses – precedence. The Employer seeks to justify the application of the wording of GCC 70.6 (a) by arguing that GCC 70.6 (a) would prevail over GCC 60.1. The Contractor's view as understood by the DAB is that no precedence exists between the two clauses and that they have to be read together.

The DAB is of the view that usually contract provisions have to be read together. This is valid for the General Conditions of Contract and within GCC 70. In the same document there is no prevailing clause and each clause has a different purpose: GCC 60.1 sets out the mechanism of invoicing, while GCC 70.1 to 70.7 sets out the change in cost, while GCC 70.6 defines more specifically the limitation for price adjustment. The DAB recalls its understanding addressed in this Decision under item 32, that the so called limitation is linked to the starting date of the price adjustment and not to an undefined amount or additional risk, which should have been included at tender time in the BOQ rates. Another argument was used to define the precedence of one clause over another by the fact that clauses are general or specific. Again the clauses have to be read together, each clause having a different purpose. The DAB does not consider that the argument related to the meaning "general versus specific" is convincing. The DAB is of the view that no clause in the GCC prevails on another clause, each clause having a different objective.

36. International practice: The Contractor relies in his submission, item 3 first on the international practice (FIDIC and World Bank standard conditions of contract) and secondly on a so called logical approach, where the price adjustment is usually made after the price adjustment has been assessed. Furthermore he supports his position by stating that it is international practice.

37. The Employer does not deny the fact that the FIDIC and World Bank apply this principle usually, but refer to the specificity of this Contract and to the modification made by introducing GCC 70.6 (a). The reference to the logic is also inappropriate for the same reason. The Employer therefore is of the view that the "...Contractor cannot rely upon international practice..." (Response, p.11).
38. The DAB does not dispute the logic of a calculation with the deduction of the advance made after having included the price adjustment and confirms that this approach is usually applied with FIDIC contracts. However the DAB does not see from a principle point of view why a different logic could not be applied and is of the opinion that the Parties were completely free to adopt any kind of mechanism for the mode of application for the price adjustment. The DAB however would have expected such an issue being discussed thoroughly between the Parties and the respective intentions of the Parties clarified during the Contract negotiations.
39. **Independency between Advance Payment and Price Adjustment.** The Parties confirm in their submissions their agreement to (i) the function of the advance payment and price adjustment provisions (Contractor, p.7, § 2 and §3 - Employer, p.12, item 4.5.1) and (ii) the fact that no price adjustment is applicable to the Advance Payment (Contractor, p.7, §2 - Employer, letter 27.11.05, 2nd bullet). Both Parties submitted that advance payment is separate and not related to the price adjustment.
40. The DAB shares the view that the advance payment and the price adjustment are independent. This has a logic of its own and has a direct consequence on the mechanism to be applied, which appears to be in contradiction with the wording of GCC 70.6 (a). This issue raises the questions
- (i) whether the limitation provided by GCC 70.6 (a) would represent an indirect negative adjustment either of the advance payment or of the price adjustment or of both, and
 - (ii) whether both Parties truly intended to include such a risk in the Contract price.
41. **Intention of the Parties.** The Employer considers that the pre-award proposal made by the Contractor in February 2002 before Contract signature (Contract price reduction of 4-5 % against increase of the Advance Payment from 15% to 25%) is a justification of the understanding and intention of the Contractor on how he intended to deal with the price adjustment and reimbursement of the advance payment: "... the Contractor demonstrated the same understanding of the intent of the Contract at pre-award stage by his statements concerning the indirect savings that the Employer would have made...." (Response, p.13, item 5.4).
42. The Contractor submits that in the Contract negotiation, his negotiators followed the interpretation of the Employer in order to appreciate the effect of a possible modification of the advance payment, but that "... the JV representatives, in good faith, due to the lack of clarity of the Contract wording, did not question the interpretation of the relevant clauses which appears to be in contradiction with the Contract."
43. The issue to consider for the DAB is therefore

- (i) whether such a negotiation does reflect the true intention of the Parties at the time of the Contract signature and
- (ii) whether this interpretation can be considered justified.

44. The DAB read the proposals made by the Contractor in the pre-award discussions early 2002 and the statements addressed by each Party in this referral. The DAB understands that the proposal for alternative payment procedures made by the Contractor was done in the context of a commercial transaction aiming, amongst other things, at obtaining an increased advance payment of 25% (instead of 15%) of the Contract price, with several restrictions, one of them being the deduction of the advanced payment portion after price adjustment. The DAB notes the following statements made

- (i) by the Contractor related to a so called "*lack of clarity of the Contract wording*" and wonders why no attempt was made to clarify this matter before signing the Contract. Such an ambiguous behaviour can be criticised.
- (ii) by the Employer that he had at that time the same understanding of the intent of the Contract during pre-award negotiations ("*...the Contractor demonstrated the same understanding...*"). This statement presented in 2006 may be correct, but does not demonstrate that it was the Employer's position and intention at the time of the Contract signature.

45. In summary, the DAB is of the view that no sufficient evidence has been provided showing at first that the intention of the Parties and their interpretation of GCC 70.6 (a) remained valid at Contract signature and secondly whether the reference to GCC 70.6 (a) is justified. Consequently the DAB is unable to assess the respective intention of the Parties at the time of the Contract signature. In other words for the DAB, the reference to a pre-award proposals to change the payment procedures (in applying GCC 70.6 (a) on its own) and to reduce the contract price against an increase of the advance payment, does neither evidence the common intention of the Parties at the Contract signature, nor justify the validity of GCC 70.6 (a). These key aspects related to the common intention of the Parties and to the validity of GCC 70.6 (a) will be developed furthermore in the following chapter.

F.5 Suggested interpretation by the DAB

46. The key issue, if the reading and the interpretation of the wording of the Contract clauses are disputed and do not lead to a satisfactory interpretation of the Contract clause, is to analyse the common intention of the Parties. This step is of importance, namely in civil law jurisdictions. The DAB notes from a factual point of view that initially there was no price adjustment during the first 3 years for this Contract (Amendment No 4, p.22, question 1.60) and no problem would have occurred with the application of the price adjustment clause. Following the query of several tenderers for a price adjustment clause and thus offering a reduction of the Contract price, the Employer decided to adjust GCC 70.1 and 70.5 only and to replace the starting date for price adjustment after a 3 years period by "*... the calendar month on which the validity date of the RFO expires*" (Addendum No 5, item 5.3.12), seemingly without analysing the impact of this modification on the other clauses. The DAB has no evidence that the application of GCC 70.6 (a) was ever discussed between the Parties before Contract signature.

47. GCC 70.6 (a) seems initially consistent with the other Contract clauses and with the limitation in time (title): The repayment of the advance payment would have been expected within the first 3 years and the issue of deduction of the advance payment before calculation of the price adjustment would not have occurred. The context has been modified by the amendment of GCC 70.5 included in Addendum No. 5 consisting of the deletion of the 3 years' grace period before application of price adjustment. This has created the difference of interpretation between Contractor and Employer presently under dispute.

48. Concerning the Contractor's intention, the DAB notes that

- (i) The Contract was signed without any reservation by the Contractor;
- (ii) A proposal was forwarded by the Contractor to the Employer during Contract negotiation offering a 4-5% price reduction on the Contract price if the advance payment was increased to 25% (indicating that the price adjustment was done after the deduction of the advance payment);
- (iii) The format of the bi-monthly invoice following the sequence of GCC 60.1 indicates that there were no differences between the Parties;
- (iv) The issue of interpretation arose between the Parties only when the first deduction for the advance payment had to be made and
- (v) The Contractor failed to mention any reservation during Contract negotiation.

It is not possible for the DAB to draw a firm conclusion from the facts presented about the true intention of the Contractor. The understanding of the DAB is that the Contractor

- (a) failed to be critical to GCC 70.6 (a) and to the wording "after" and did not seek for clarification;
- (b) did not assess the financial and contractual impacts of the modification of GCC 70.5 (namely the impact of the unknown cost indices);
- (c) still considered the FIDIC standard price adjustment clause at Contract signature would be applicable.

49. Concerning the intention of the Employer, the DAB notes that

- (vi) The Contract was signed without any reservation by the Employer;
- (vii) The amendments of GCC 70. 1 and GCC 70.5 did not lead to amendments of other clauses (not only GCC 70.6 (a) but GCC 60.1 and 70.3 remained unchanged);
- (viii) The proposal forwarded by the Contractor during Contract negotiation offering a 4-5% price reduction on the Contract price if the advance payment was increased to 25% (indicating that the price adjustment was done after the deduction of the advance payment) was rejected,
- (ix) The format of the bi-monthly invoice following the sequence of GCC 60.1 was not questioned;
- (x) The issue of interpretation arose between the Parties only when the first deduction for the advance payment had to be made and

Again it is not possible for the DAB to draw a firm conclusion from the facts presented about the true intention of the Employer and of its Consultant. The understanding of the DAB is that the Employer

- (a) did not initiate a discussion on the application of GCC 70.6 (a), nor clarified the risks to be borne by the Contractor;
- (b) did not submit a convincing evidence in support of his true intention ;
- (c) did not specify the additional risks and costs to be borne by the Contractor following a strict accordance with of GCC 70.6 and its plain wording and did not accordingly adjust the other clauses.

50. The hypothetical example presented hereafter, shows the effect of an increase of the price adjustment from 5% to 10%, illustrates the difference in interpretation of GCC 70.6 (a), if interpreted in accordance with the Contractor's and Employer's submissions:

A. With a price adjustment factor of 5%

Contractor's position (in € Euro 1000/month)	Employer's position (in € Euro 1000/month)	Difference (in € Euro 1000)
- Value of the works and amount on which price adjustment is applied: 10,000 - Price adjustment of 5%: 500 - Deduction of the advance payment: 1,000	- Value of the works: 10,000 - Deduction of the advance payment: 1,000 - Amount on which price adjustment is applied: 9,000 - Price adjustment of 5%: 450	
Total amount works and price adjustment: <u>9,500</u>	Total amount works and price adjustment: <u>9,450</u>	€ 50

C. With a price adjustment factor of 10%

Contractor's position (in € 1,000/month)	Employer's position (in € 1000/month)	Difference (in € 1,000)
- Value of the works and amount on which price adjustment is applied: 10,000 - Price adjustment of 10%: 1,000 - Deduction of the advance payment: 1,000	- Value of the works: 10,000 - Deduction of the advance payment: 1,000 - Amount on which price adjustment is applied: 9,000 - Price adjustment of 5%: 900	
Total amount works and price adjustment: <u>10,000</u>	Total amount works and price adjustment: <u>9,900</u>	€ 100

In other words, if the price adjustment factor would rise from 5% to 10%, the difference between Contractor's and Employer's positions (€ 10,000-9500 and € 9900-9450) would result in a loss for the Contractor of € 50,000 / month. The DAB does not believe that the intention of the Employer was to mislead the tenderers.

51. The DAB is of the view that the following aspects are the relevant issues in assessing this dispute:

- (i) The inconsistency between GCC 70.3 and GCC 70.6 - item (i). GCC 70.3 provides that the price adjustment is to be applied to "amounts ... determined in accordance with Sub-Clause 60.1 (c) and Sub-Clauses 60.1 (d) and (e), where such variations and Day Work are not otherwise subject to adjustment." For GCC 70.3 to be consistent with GCC 70.6 (a), GCC 70.3 would have to provide that price adjustment is to be applied to amounts determined in accordance with GCC 60.1 (c), (d), (e) less (i). Item (i) is the amount to be deducted as advance repayment.
 - (ii) The absence of reaction by the Parties. The Contractor, by proposing alternative payment procedures in the pre-award negotiations in accordance with GCC 70.6 (a) and noting a so called lack of clarity in the Contract, would have been expected to request a clarification from the Employer. The Employer would have been expected to clarify his specific expectation in respect of price adjustment. Both Parties then would have been in a position to render the Contract consistent.
 - (iii) The incoherence of the approach to be used in the calculation of price adjustment for the 3 relevant periods i.e. before, during and after the repayment of the advance. The approaches used for the price adjustment before and after the repayment of the advance are the same and lead to unmodified P_n , while the approach for the period of repayment leads to a reduced P_n .
 - (iv) The unbalanced calculation of the price adjustment, where a loss of revenues has to be considered with every increase of the cost indices. Actually an increase in the value of the any cost index leads to a monthly reduction of the actual price adjustment, which no longer corresponds to the value intended to be in accordance with the formulae of GCC 70.3.
 - (v) The contradiction between the statements made by both Parties about fairness and balance, being the basic principles underpinning the Contract, and the suggested interpretation of the Contract clauses, allocating such an unusual risk without clearly defining the intention of the Parties with respect to the consequences of the changes of the start of price adjustment.
 - (vi) The non-conformity between the submissions made by both Parties that the reimbursement of the advance is not subject to price adjustment and the reality, whereby the Contractor's payments are reduced by the amount of the advance repayment plus the amount of the repayment multiplied by P_n .
52. The DAB is unable to impute to either Party the intention of a misrepresentation in respect of GCC 70.6 (a). The view of the DAB is that neither Party really paid attention to GCC 70.6 (a) when GCC 70.5 was amended in the course of the negotiations and nobody appears to have considered the impact of a strict application of this clause. The DAB therefore is not convinced that
- (i) the true intention of the Parties at the Contract signature to apply GCC 70.6 (a) in the amended Contract in accordance with its strict wording is not evidenced and
 - (ii) the interpretation of this clause might be made without evidence of the common intention of the Parties.

53. A reasonable explanation for the DAB cannot be found in the direct interpretation of the clauses as written. Taking into account the inconsistencies noted in paragraph 51 and the absence of evidence provided by the Parties concerning their intentions, the DAB is therefore of the view that, by modifying the starting date of the price adjustment (amended GCC 70.5), the Parties omitted to adjust the other contract clauses, namely GCC 70.6 (a). The DAB is thus of the view that by having modified GCC 70.5, GCC 70.6 (a) becomes erroneous: either GCC 70.6 (a) should have been deleted or the word "after" in GCC 70.6 (a) should have been replaced by "before".
54. In summary from a factual point of view, the Contract clauses as drafted initially with the price adjustment starting after a 3 years period, did not create difficulties. The DAB has neither been convinced by the interpretation presented by either Party, nor by the fact that the wording of the non standard but specific clause GCC 70.6 (a) would match with the intention of either Party, nor with the other Contract clauses, nor with international business practice and usages. The DAB considers that the price adjustment has to be applied to the value of the works actually performed and that the price adjustments should be made before any deduction is effected.

F.6 Legal considerations

55. In presence of an error in the Contract Clause, the issue is whether such an error may be rectified in accordance with the prevailing law or not, which in this case is Egyptian law. It becomes therefore a legal issue. From its experience the DAB members know that the amendment of an erroneous Contract Clause would hardly be possible under common law, but could be envisaged under civil law.
56. The French Code Civil in CC art. 1110 stipulates that there is no valid agreement if the acceptance has been given by error, or if it has been surprised by the notion of violence or misrepresentation. It is namely commented under the notion of "errors in law" and introduced in art. 1116. The misrepresentation is a cause for cancelling the validity of the contract clause, if it becomes obvious that the other Party would not have signed the agreement. The French text reads as follows:

"Il n'y a point de consentement valable, si le consentement n'a été donné que par erreur, ou s'il a été extorqué par violence ou surpris par le dol. " (art.1110) and "Le dol est une cause de nullité de la convention lorsque les manoeuvres pratiquées par l'une des parties sont telles, qu'il est évident que, sans ces manoeuvres, l'autre partie n'aurait pas contracté" (art. 1116).

In case of error, violence or misrepresentation with the intention to harm the other party), art. 1117 stipulates that a contract clause is not void, but gives the right to either Party to introduce an action for canceling this clause or for correcting the error. The French text reads as follows:

"La convention signée par erreur, violence ou dol, n'est point nulle de plein droit ; elle donne seulement lieu à une action en nullité ou en rescision, dans le cas et de la manière expliqué à la section VII du chapitre V du présent titre. "

57. In a similar manner the Swiss Code of Obligations in CO art. 23 and 24 introduces the notion of essential error, namely (1) when a party admitting its error, had in mind to agree to a contract which is different from the one he has declared to agreed upon

and (3) when the error is related to facts that the commercial loyalty would allow a party, admitting this error, to consider these facts as mandatory aspects of the contract. In such a case the clause of the contract becomes not binding. The French text reads as follows:

“Le contrat n'oblige pas celle des parties qui, au moment de le conclure, était une erreur essentielle.”

“ L'erreur est essentielle, notamment : 1. lorsque la partie qui se prévaut de son erreur entendait faire un contrat autre que celui auquel elle a déclaré consentir ; ...3. lorsque l'erreur porte sur des faits que la loyauté commerciale permettrait à celui qui se prévaut de son erreur de considérer comme des éléments nécessaires du contrat... »

58. The DAB does not believe that in this case the consent has been achieved under pressure nor with the specific intention to harm the other party. The DAB consider that this is a case of an omission, which needs to be corrected.
59. The DAB has enquired, in case of such an inconsistency or error in the Contract, whether the Egyptian law follows the same principles as outlined above. The Egyptian law abides to a great extent to the French law. The DAB is therefore of the opinion that such an error, subject of this referral, needs to be adjusted either by deleting GCC 70.6 (a) or replacing the word “after” by “before”, thus rendering the different Contract clauses consistent with each other.

G. DECISION OF THE DAB

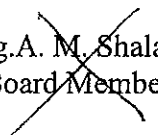
60. The decision requested by both Parties is *“How Clauses 60 and 70 shall be operated in respect of Price Adjustment and in particular as regards the reimbursement of the Advance Payment.”*
61. Based on the above factual and contractual considerations, the DAB issues a majority Decision in accordance with GCC 67.3 of the Addendum No 5 and in accordance with paragraph 10 of the annex to the Dispute Board agreement in the following terms:
- The Price Adjustment shall apply to the amount of the invoice for the bi-month invoice as stipulated by GCC 60.1, prior any deduction for repayment of the Advance Payment is made.
 - The wording of GCC 70.6 (a) has consequently either to be deleted or be modified by replacing the word “after” by the word “before”. Thus the reading GCC 70.6 (a) will read as follows

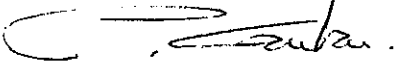
“Price adjustment will only be made to the amounts invoiced by the Contractor before deduction of the portion of the Advance Payment to be credited by the Contractor”

62. The above Decision No. 2 is a determination issued by the DAB as a majority decision. A separate written report by the DAB member disagreeing with this Decision is forwarded separately to the Parties. This report gives the reasons for his disagreement.
63. The DAB invites the Parties to implement the above Decision without delay with due consideration to GCC 67.5 of Addendum No 5.

Athens, Cairo and Lausanne, the 26 April 2006

THE DISPUTE ADJUDICATION BOARD


Eng. A. M. Shalaby
(Board Member)


Eng. Pierre M. Genton
(Chairman)


Eng. Rohan Shorland
(Board Member)

د- إعتراض المالك

IN THE MATTER OF AN ARBITRATION PROCEEDING

UNDER THE UNCITRAL ARBITRATION RULES

Between

**MINISTRY OF WATER RESOURCES AND IRRIGATION
OF THE ARAB REPUBLIC OF EGYPT**

Claimant and Defendant to Counterclaim

And

**VINCI CONSTRUCTION GRANDS PROJECTS (FRANCE)
BILFINGER BERGER A.G. (GERMANY)
ORASCOM CONSTRUCTION INDUSTRIES (EGYPT)**

Respondents and Counterclaimants

AWARD

ARBITRAL TRIBUNAL

Professor Piero Bernardini – Chairman

Dr. Hassan Reda – Arbitrator

Me. Serge Lazareff – Arbitrator

Date: 7 August 2007

TABLE OF CONTENTS

I	INTRODUCTION.....	2
II	THE PROCEEDINGS	6
III	THE PARTIES' POSITIONS AND PRAYERS FOR RELIEF.....	11
	a) <i>Claimant 's position</i>	11
	b) <i>Claimant's prayer for relief</i>	29
	c) <i>Respondents' position</i>	30
	d) <i>Respondents' prayer for relief</i>	49
IV	DISCUSSION	
	A. General Remarks	50
	B. Analysis of individual Sub-Clauses	54
	i. <i>Sub-Clause 60.1</i>	54
	ii. <i>Sub- Clause 70.6(a)</i>	54
	C. Consistency of Sub-Clause 70.6(a) with other Sub-Clauses	55
	i) <i>Sub-Clause 60.1</i>	55
	ii) <i>Sub-Clause 60.7</i>	56
	iii) <i>Sub-Clause 70.1</i>	57
	iv) <i>Sub-Clause 70.2</i>	57
	v) <i>Sub-Clause 70.3</i>	58
	D. The contractual interpretation	58
V.	THE TRIBUNAL'S DECISION	71
	A. Regarding the interpretation of the Contract	71
	B. Regarding costs	76
	DISPOSITIF	79

I INTRODUCTION

1. These proceedings arise in connection with the Naga Hammadi New Barrage and Hydropower Plant project, an important infrastructural development on the River Nile, approximately 120 km north of Luxor, in Upper Egypt. This project, with the total value of two hundred and six million Euro (€ 206 million) and four hundred and ninety seven million (€ 497 million), was put out to tender in August of 2000 in five separate lots as follows: Lot 1: Civil Works; Lot 2: Hydro-mechanical equipment; Lot 3: Turbines and Generators; Lot 4: Electric Equipment; Lot 5: Transmission Line 220 KV. The tendering phase, concluded in September 2001, was followed by detailed negotiations leading to the signature, in November and December 2001 for lots 3, 4 and 2 respectively, and in June 2002 for Lot 1.
2. These proceedings relate to Lot 1 (Civil Works) and to a contract signed on 1 June 2002 between the Egyptian Ministry of Water Resources and Irrigations (the "Employer" or "Claimant") and a Joint Venture comprising three international contractors, namely Vinci Construction Grands Projets, Bilfinger Berger AG and Orascom Construction Industries (the "Contractor" or "Respondents") (the "Contract"). The total value of the Contract is € 113.4 million and

EGP 445.3 million (a contract price of EGP 154,147,436 and € 21,237,500, plus provisional sums estimated at EGP 154.147.436 and € 21.237.500).

3. The issue in dispute in these proceedings is, in the words of Respondents, *"the incidence (if any) of the Advance Payment on the Price Adjustment calculation"* (Respondents' Referral No. 2, Cover letter dated 2 February 2006, C-3)¹; or, to put it another way, *"How [do] the price adjustment provisions have to be applied?"* (Respondents' Referral No. 2, C-4, page 1). The parties agree that the question is one of contractual interpretation.
4. Price adjustment is governed by Clause 70 of the General Conditions of the Contract². Specifically, the dispute centres on the meaning of a particular paragraph, Sub-Clause 70.6(a), headed "Limitation for Price Adjustment". It reads:

"Price adjustment will only be made to the amounts invoiced by the Contractor after deduction of the portion of the Advance Payment to be credited by the Contractor".

In essence, the Contractor is of the view that the adjustment should be applied on the value of the works before any deduction for the advance

¹In the present Award, the Parties' exhibits will be designated with the letter "C" for Claimant and the letter "R" for Respondents, followed by the number of the exhibit.

² Unless otherwise specified, reference to a Clause or a Sub-Clause means reference to Clauses and Sub-Clauses of the General Conditions of the Contract.

payment while the Employer contends that it should be applied after such deduction.

5. Following the issuance by the Employer on 27 November 2005 of its decision rejecting Respondents' claim pursuant to Sub-Clause 67.1 (C4-Annex 8), Respondents referred the matter to the Dispute Adjudication Board ("DAB") appointed pursuant to Sub-Clause 67.2 and comprised of Messrs Pierre Genton, Chairman, Rohan Shorland and Abdul Rahman Shalaby, members.
6. The DAB rendered a majority decision on 26 April 2006, Mr Shalaby dissenting, concluding as follows:

"The Price Adjustment shall apply to the amount of the invoice for the bi-month invoice as stipulated in GCC 60.1, prior any deduction for repayment of the Advance Payment is made. The wording of GCC 70.6.(a) has consequently either to be deleted or be modified by replacing the word "after" by the word "before". Thus the reading GCC 70.6.(a) will read as follows: Price adjustment will only be made to the amounts invoiced by the Contractor before deduction of the portion of the Advance Payment to be credited by the Contractor" (DAB Majority Decision, C-5, para. 61, page 17).
7. Following its notice of dissatisfaction with the DAB's decision in accordance with Sub-Clause 67.3 and in the absence of an amicable settlement pursuant to Sub-Clause 67.4, the Employer resorted to arbitration under Sub-Clause 67.7.

8. Sub-Clause 67.7 ("Arbitration") reads as follows:

"Any dispute, which may arise between the Employer and Contractor concerning the interpretation of this Contract and the performance of the various commitments thereof which cannot be settled amicably shall be submitted to arbitration in accordance with the United Nations Committee on International Trade Law (UNCITRAL).

This includes any dispute in respect of which:

- a) the decision, if any, of the Dispute Adjudication Board has not become final and binding pursuant to Sub-Clause 67.3, and*
- b) amicable settlement has not been reached.*

In this regard, the party which intends to resort to arbitration must inform the other party by registered mail with return receipt. The registered letter shall include the name of arbitrator appointed by the party applying for arbitration. The opposing party will have one month to appoint its arbitrator. The two arbitrators so appointed shall meet within 15 (fifteen) days from the date of their acceptance in order to appoint a third arbitrator as a Chairman with whom they shall form the arbitration board.

In case after 15 days from the above meeting the two arbitrators do not reach an agreement as to the appointment of the said Chairman, he will be appointed by the President of the Cairo Regional Centre for International Commercial Arbitration upon request of the party who will apply first. The chairman shall neither be Egyptian nor of the Contractor's nationality.

The arbitrators will have a period of three months to decide, counting from the date of the acceptance of the Chairman; they will not be bound by any procedure whatsoever and they will take into consideration first of all the will of the parties, the principles of equity, or good faith and of custom. The arbitrator(s) shall have full power to open up, review and revise any decision of the Dispute Adjudication Board.

Neither party shall be limited, in the proceedings before such arbitrator(s), to the evidence or arguments previously put before the Dispute Adjudication Board to obtain its decision.

Arbitration may be commence [sic] prior or after completion of the Works. The obligations of the parties and the Dispute Adjudication Board shall not be altered by reason of the arbitration being conducted during the progress of the works.

The arbitration board will meet and sit in Cairo, A.R.E.

Should one of the arbitrators be in the impossibility to carry out his tasks or resigns [sic], the same will be replaced by the party who has appointed him. The notice of this replacement will be given to the other party by registered letter with return receipt within 15 (fifteen) days from the date on which the above impossibility or resignation has been ascertained.

Should one of the parties fail to appoint or substitute its arbitrator within 15 (fifteen) days from receipt of the request from the other party, he will be appointed by the Cairo Regional Centre for International Commercial Arbitration.

The decision of the arbitration board which shall be reached by majority of votes, must include the motives and arguments of the judgement and shall be binding, final and subject to no appeal and both parties undertake to fulfil and execute the arbitration's [sic] decision.

Any party may submit the decision in question to the court of competent jurisdiction in order to render it enforceable under the laws of the country of that court. The official language of arbitration shall be the English language.

Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the Works in accordance with the Employer's decisions, determinations, instructions and orders."

9. According to Sub-Clause 5.1(b), the Contract is governed by and construed according to the laws of Egypt.

II THE PROCEEDINGS

10. By Notice of Arbitration sent on 20 June 2006 the Employer notified the Contractor the commencement of the arbitral proceedings and the appointment of Dr. Aktham El Kholy as arbitrator. Subsequently, Dr. El Kholy was replaced by Dr. Hassan M. Reda.

By letter of 19 July 2006 the Contractor notified the appointment as arbitrator of Me. Serge Lazareff.

The two arbitrators appointed Professor Piero Bernardini as third and presiding arbitrator in accordance with Sub-Clause 67.7. The parties were notified on 31 August 2006 of Professor Bernardini's appointment and of his acceptance of the appointment. The Arbitral Tribunal (the "Tribunal") as so constituted has remained in place throughout these proceedings.

11. Following exchange of communications and the filing of powers of attorney, the parties' representation in these proceedings is as follows:

a) Claimant is represented by:

i) Dr. Karim Hafez
5 Ibrahim Naguib St., Garden City
Cairo 11451 (Egypt)
Tel 0020 2 79 45 368
Fax 0020 2 79 45 836
e-mail : mail@hafeznet.com

ii) Counsellors Milad Sidhom and Ahmed Saad
Department of Foreign Disputes
State Lawsuits Authority
Mogama's Building
Tahrir Square, Cairo (Egypt)
Tel 0020 2 794 45 95
Fax 0020 2 795 17 19
e-mail: statelawsuitauthority@gmail.com

b) Respondents are represented by:

i) Me. Yves Derains and Me. Bertrand Derains
Derains & Associés
167 bis, avenue Victor Hugo
75116 Paris (France)
Tel 0033 1 45 53 38 38
Fax 0033 1 45 53 63 48
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ii) Me. Abdel Aziz Mohammed Aïdaros
Shalakany Law Office
12, El Marashly St., Zamalek, Cairo (Egypt)
Tel 0020 2 7288888
Fax 0020 2 7370661
e-mail: aidaros@shalakany.com

12. Following agreement of the Parties, Procedural Order No. 1 was issued on 26 September 2006 providing for:
- the procedural calendar, including a double exchange of sequential written submissions and the holding of a hearing on 17-19 April, 2007 in Cairo;
 - the time-limit for the award, not later than 31 August 2007;
 - the fees for the members of the Tribunal, in the amount of € 500.00 for each hour of work, plus VAT and expenses.
13. As provided by Procedural Order No. 1, written submissions were filed as follows:
- Claimant's Statement of Claim, on 27 November 2006;
 - Respondents' Statement of Defence, on 26 January 2007;
 - Claimant's Reply and Defence to Counterclaim, on 18 February 2007;
 - Respondents' Rejoinder, on 12 March 2007.

14. Following consultation with the Parties, by Procedural Order No. 2 of 29 March 2007 the hearing was convened in Cairo on 17, 18 and 19 April 2007. The agenda and the rules governing the examination of witnesses at the hearing were adopted by the Order.
- The hearing was held on 17 and 18 April 2007, at the premises of the Cairo Regional Centre for International Commercial Arbitration. The following witnesses were heard (in the order):
- a) for Claimant:
 - Eng. Ibrahim Aly
 - b) for Respondents
 - Mr. Michel Large
 - Mr. Joël Petit
 - Mr. Gilles Rolland
15. By Procedural Order No. 3 of 26 April 2007 the Parties were given ten (10) days following receipt of the hearing transcript (later extended by few additional days) to identify and possibly agree on errors in the transcript. By the same Order the time-limit for the filing of simultaneous Post-Hearing Briefs was fixed at forty (40) days after receipt of the hearing transcript.
16. The transcript of the hearing was sent to the Parties and the members of the Tribunal on 7 May 2007. On 21 May 2007 the Parties indicated to have reached agreement on the transcript corrections.

17. Post-Hearing Briefs were filed by the Parties on 18 June 2007, as provided by Procedural Order No. 3. Comments on the other Party's calculation of amounts allegedly due were filed by Respondents on 28 June 2007, as requested by the Tribunal. Claimant has failed to submit any such comments, being thus deemed to have accepted Respondent's calculations as indicated in the Tribunal's letter of 21 June, 2007.
18. In accordance with Article 29(1) of the UNCITRAL Arbitration Rules the Tribunal has declared closed the hearing by Procedural Order No. 4 dated 26 June 2007.
19. As provided by Procedural Order No. 3 each Party has submitted a statement of the costs incurred by 18 July 2007. Both Party have declined to comment on such statements of costs within the time-limit given by the same Order.
20. The following sums were advanced by the parties in equal shares, as requested by the Tribunal:
- a) € 75.000,00, pursuant to Procedural Order No. 1;
 - b) € 170.000,00, pursuant to Procedural Order No. 3;
 - c) € 30.000,00, pursuant to Procedural Order No. 5;

for a total advance payment of € 275.000,00 to cover fees (including VAT, when applicable) and expenses of the members of the Tribunal as well as expenses incurred for these proceedings.

III THE PARTIES' POSITIONS AND PRAYERS FOR RELIEF

A. Claimant's position and prayer for relief

a) *Claimant's position*

21. According to Claimant, the present dispute involves two clauses of the Contract, 70 and 60, each serving a specific purpose. As correctly noted by the DAB, "*no clause in the GCC prevails on [sic] another clause, each clause having a different objective*" (DAB Majority Decision, C-5, para.35, page. 10).

Clause 70 entitled "Changes in Cost and Legislation" is the only provision of the Contract dealing with the Contractor's entitlement to price adjustment for "*the rise or fall in the costs of general inputs to the construction works, labours, materials, Contractor's equipment and fuel*" (Sub-Clause 70.1).

Sub-Clause 70.2 stipulates that the Contractor is assumed to have built into its Contract Price adequate contingency for non-compensable changes in cost. Sub-Clause 70.3 sets out a general rule for the computation of the price adjustment payable in any bi-monthly period. Sub-Clause 70.6 introduces, by way of exception, a limitation

on the otherwise payable price adjustment. Such limitation applies in two different sets of circumstances, addressed in paragraph (a) (*supra*, para.4) and (b) respectively, each giving rise to specific adjustment to the general rule.

22. Clause 60, entitled "Invoices and Payment", serves a completely different purpose. In particular, Sub-Clause 60.1 defines the Contractor's obligation in terms of format and content of invoices. It does create neither rights nor entitlements, but sets out the amounts to be computed pursuant to various contractual provisions that themselves create rights and obligations. The amount to be inserted in sequence as items 60.1(f) is the amount that the Contractor will have previously computed in application of the terms of Clause 70, to which item 60.1(f) makes express reference. Any other interpretation would violate standard canons of contractual interpretation.
23. Sub-Clause 70.6, which deals with a limitation on the Contractor's ordinary entitlement to price adjustment under the remainder of Clause 70, could not be more clearly drafted. In this context, the expression "*amounts invoiced by the Contractor*" can only refer to the amounts specified in Sub-Clause 70.3, which include essentially those invoiced under item 60.1(c) and, where applicable, items 60.1(d) and

60.1(e). The expression "*portion of the Advance Payment to be credited by the Contractor*" plainly relates to the Contractor's obligation to repay the Advance Payment spelled out in Sub-Clause 60.7. The "portion" is a sum equal to 30% of the approved amount due under Sub-Clause 60.1(c) in each bi-monthly invoice issued after the total of all approved bi-monthly invoices has reached 30% of the Contract Price less Provisional Sums (as defined by Sub-Clause 58.1), until complete repayment of the Advance Payment.

Sub-Clause 70.6(a) is consistent with the clear intent of any other relevant provision of the Contract so that, according to the canons of interpretation accepted by Respondents, the Tribunal must look no further.

24. There is no conflict between Sub-Clause 70.6(a) and Sub-Clause 70.2 since the latter expressly contemplates the possibility that full compensation for any rise and fall in costs to the Contractor has not been covered by the latter, the difference between partial and full compensation being deemed as included in the unit rates and prices to cover that contingency.
25. There is no conflict between Sub-Clause 70.6(a) and Sub-Clause 70.3. The latter contains the general price-adjustment formula, applicable to

all scenarios, and defines its components. The former (as well as Sub-Clause 70.6(b)) adapts the general formula to specific circumstances, expressly restricting the Contractor's entitlement to price adjustment.

26. There is no conflict between Clause 70, including Sub-Clauses 70.3 and 70.6, and Sub-Clause 60.1. The latter reads as follows:

"Bi-Monthly Invoice

The Contractor shall submit an invoice in six copies to the Employer at the end of each bi-month period, in a tabulated form approved by the Employer, showing the amounts to which the Contractor considers himself to be entitled. The invoice shall include the following items, as applicable, which shall be taken into account in the sequence listed:

- a) The estimated value of the Temporary and Permanent Works executed up to the end of the bi-month period in question, determined in accordance with Sub-Clause 56.1 at base rates and prices.*
- b) The actual value approved for payment for the Temporary and Permanent Works executed up to the end of the previous bi-month period, at base rates and prices.*
- c) The estimated contract value at base rates and prices of the Temporary and Permanent Works for the bi-month in question, obtained by deducting (b) from (a).*
- d) The value of any variations executed up to the end of the bi-month period in question, less the amount in the previous approved invoice, expressed in the relevant amounts of foreign and local currency, pursuant to Clause 52.*
- e) Amounts approved in respect of Day Work executed up to the end of the month in question, less the amount for Day Work in the previous approved invoice, indicating the amounts of foreign and local currencies as determined from the Day Work Schedule of the Bill of Quantities.*
- f) Amounts reflecting changes in cost and legislation pursuant to Clause 70, expressed in the relevant amounts of foreign and local currencies.*
- g) Any credit or debit for the month in question in respect of materials and Plant for the Permanent Works, in the relevant*

amounts, in foreign and local currencies, and under the conditions as set forth in Sub-Clause 60.3.

h) Any amount to be withheld under the retention provisions of Sub-Clause 60.5, determined by applying the percentage set forth in Sub-Clause 60.5 to the amounts in foreign and local currencies due under Sub-Clauses 60.1(c), (d), (e) and (f).

i) Any amounts to be deducted as repayment of the Advance Payment under the provisions of Sub-Clause 60.7.

j) Any other sum, expressed in the applicable currency or currencies, to which the Contractor may be entitled under the Contract. Unless otherwise stated in the Technical Specifications invoices and payment of lump sums will be according to progress of the Works and the breakdown of the lump sum approved in accordance with Sub-Clause 57.2 of the Conditions of Contract”.

27. Nothing in Sub-Clause 60.1 gives rise to financial rights, entitlements or obligations. In each line item the relevant amount or value is calculated by reference to another Sub-Clause, to which reference is expressly made in the relevant line item. Sub-Clause 60.1 provides a format for the presentation of entitlements or obligations created pursuant to other specific contractual clauses, primarily Sub-Clause 60.7 and Clause 70.
28. The Contractor's entitlement to price adjustment is not affected by the sequence prescribed by Sub-Clause 60.1. The entitlement to the amount of item 60.1(f) originates expressly in Clause 70. The amount computed pursuant to Clause 70 results from the formula in Sub-Clause 70.3 subject, were applicable, to the limitations set forth in Sub-Clause 70.6. Accordingly, in order to calculate the amount due in

respect of price adjustment for a given bi-monthly period, the price adjustment factor of the formula set out in Sub-Clause 70.3 should be applied to the difference between the amount subject to price adjustment (item 60.1(c)) and the amount of the Advance Payment repayment due for the same period in accordance with Sub-Clause 60.7 (30% of item 60.1(c)).

29. There is no inconsistency between Sub-Clause 70.6(a) and Sub-Clause 60.7. Respondents contend that Sub-Clause 70.6(a) submits the Advance Payment repayment to Price-Adjustment, causing "interest" to be charged on a "loan" which Sub-Clause 60.7 intends to be interest-free. Respondents' argument mixes two issues and two entitlements which the Parties agree are distinct.
30. There is, therefore, no difficulty of interpretation, application or reconciliation among the various provisions involved in the process, namely: Sub-Clauses 70.3, 70.6, 60.7 and 60.1. This is so because price adjustment and advance payment are conceptually distinct. All matters related to price adjustment are dealt with exclusively and comprehensively in Clause 70. All matters affecting the parties' rights and obligations on invoicing, payment and repayment of the Advance Payment are exclusively and comprehensively specified in Clause 60.

Claimant's interpretation ensures consistency between the express wording and the objective and structure of the Clauses concerned. This stands in stark contrast with Respondents' approach.

31. According to Respondents, the expressions in Sub-Clause 70.6(a) "*amounts invoiced by the Contractor*" and "*portion of the Advance Payment to be credited by the Contractor*" have a specific meaning.
32. Respondents contend that the expression "*amounts invoiced by the Contractor*" is applicable to "*all amounts invoiced by the Contractor and it is specifically stated in Sub-Clause 60.7 that the Employer will make Advance Payment against invoice*" (Respondents' letter of 29 June 2005, C-7). In Claimant's view, this interpretation would mean that instead of limiting the scope of the price adjustment, as announced by the title of Sub-Clause 70.6(a) and emphasized by the word "only", Sub-Clause 70.6(a) would broaden the scope of the Contractor's entitlement to price adjustment adding to the invoiced items of costs the amount of the Advance Payment. This would conflict with Sub-Clauses 70.1 and 70.2 which restrict the Contractor's right to price adjustment to *specific* costs of performance of the Works. Taking this position is, in Claimant's opinion, essential

to Respondents for bringing into play the Advance Payment (Sub-Clause 60.7) and its repayment (Sub-Clause 60.1(i)).

33. According to Respondents, the expression "*portion of the Advance Payment to be credited*" means that the said portion is the amount still to be repaid in further bi-monthly invoices since the word "credited" is used instead of "repayment" as in Sub-Clause 60.1(i). Therefore, the portion in question does not refer to item (i) in the sequence listed in Sub-Clause 60.1.

In Claimant's view, in the contractual accounting system debit items are dues payable to the Contractor. A deduction is therefore a credit item in favour of the Employer and Sub-Clause 60.7 states that "*the advance Payment shall be repaid through deductions from the amount due to the Contractor*" so that the expression "to be credited" is equivalent to "to be deducted".

34. The word "portion" is, in Claimant's view, in full accordance with the mechanism of progressive repayments in proportion to the value of the Works invoiced on a bi-monthly basis while the word "balance" should have been used had the drafter meant what Respondents now assert to be the meaning of the expression. The examples given by Respondents to show the practical application of their interpretation

disprove, on one side, the contention that the expression "*portion of the Advance Payment to be credited*" does not refer to item 60.1(i) and, on the other side, lead to the inevitable conclusion that Sub-Clause 70.6(a) is completely redundant. On the contrary, the amount of the Advance Payment repayment is "credited" only when inserted in the invoice as item (i), the invoice is approved and the corresponding amount is offset against the Contractor's positive entitlement. It is not disputed that the Advance Payment repayment is governed by Sub-Clause 60.7.

35. Respondents' contention that Sub-Clause 70.3 "*does not stipulate any deduction for reimbursement of Price Adjustment* [sic: it should probably read "of Advance Payment"] *from the amount to be adjusted*" (Referral No. 2, C-4, page 2) misses the point since Sub-Clause 70.3 sets out only the general rule applicable throughout the life of the Contract to the price adjustment while Sub-Clause 70.6 contemplates exceptions to the general rule applicable to specified circumstances only.
36. Respondents' interpretation attempts to reconcile the alleged conflict between Sub-Clause 70.6(a) and the sequence prescribed by Sub-Clause 60.1. In Claimant's view there is no such conflict when due

account is taken of the purpose of each clause and of the express contract language. As already mentioned (*supra*, para 28), according to the express wording of Sub-Clause 60.1(f), indicating that the amount of the price adjustment is to be calculated "*pursuant to Clause 70*", the relevant amount, once so calculated and inserted as item (f), has already taken into account the deduction of the Advance Payment according to Sub-Clause 70.6(a).

37. Respondents allege that the Parties' contractual practice shows their common understanding that the Price Adjustment would be calculated before deducting repayment of the Advance Payment. The reference is to one single isolated incident when Claimant failed to spot the error in invoice No. 11 in computation of the amount due for Price Adjustment and approved the invoice. This cannot be a binding practice. As to the invoice format, the Employer did not approve the Contractor's departure from Sub-Clause 60.1, for example regarding the inclusion of the Advance Payment as an additional item.
38. The international practice to which Respondents refer in support of their interpretation is inadmissible in these proceedings since, according to Article 147 of the Egyptian civil code ("ECC"), the contract is the law of the parties and Article 150 ECC precludes

inquiry into the parties' intention when the wording of the contractual provision is clear, as is the case of Sub-Clause 70.6(a).

39. During the pre-award discussions, Respondents gave proof of their understanding of Clause 70, specifically of Sub-Clause 70.6(a). In fact, on 9 February 2002 (C-11) and on 2 March 2002 (C-12), the Contractor proposed alternative payment procedures designed to reduce the price adjustment burden to Employer. These procedures related to retention (guarantee instead of bi-monthly deductions); to Advance Payment (25% instead of 15%; Advance payable in the two contractual currencies or in Euro only); and to the timing of repayment of the Advance Payment (to start at 50% and to complete by 90% of Contract value, instead of 30% and 80%, respectively).
40. Respondents advised the Employer that:
- “As a result of the increased Advance Payment and of its repayment effected later than originally scheduled, there will be a major saving (amounting to approximately 20%) in the anticipated cost of Price Adjustment.*
- Based on the provision for Price Adjustment advised by the Employer during Pre-Award Discussion (10 million Euro plus 53 million LE) this saving of 20% may represent up to Euro 2.000.000 plus LE 10.600.000”* (letter of 9 February 2002, C-11, Section B.2(i)).
41. First, the increase in the percentage payable by way of advance payment can result in savings on the amount payable in respect of

price adjustment if, and only if, the advance payment repayment is deducted before applying the price adjustment formula. Absent such deduction, there can be no saving. Second, Respondents could not have calculated the value of the price adjustment savings resulting from their proposal except by comparing the original contractual arrangements with the proposed alternatives. Respondents did not provide the Employer with the underlying calculations but Claimant has reconstituted those and has set out the results in a table (enclosed as C-13). By Respondents' own admission "*the negotiators from the JV followed the interpretation of the Employer on Sub-Clause 70.6 and they considered in their calculations the amount of the Price Adjustment with which they had been provided ("based on the provisions advised by the Employer")*" (Referral No. 2, C-4, page 6).

42. Respondents contend that "*the JV representatives, in good faith, due to the lack of clarity of the Contract, did not question the interpretation made by the Employer of the relevant clauses, which appears to be in contradiction with the Contract*" (Referral No. 2, C-4, page 6). This is highly improbable. First, the tenderers (all highly experienced international contractors) were expressly on notice that failure to timely report obscurity or inconsistency or to seek explanation would preclude relief. In fact, the Tender Documents

provide that "*The Employer will not assume any responsibility for any errors or omissions in the Tender Documents if the Tenderer has not requested an explanation in due time*" (Clause 3.3.5). It is inconceivable that Respondents would have identified but failed to raise a critical ambiguity unless, of course, they have built the corresponding risk into their price. Second, by their own admission, Respondents understood the Employer's interpretation and intended application of the contractual price adjustment mechanism. In fact, they understood so well that they could calculate price savings based on alternative invoicing and payment terms.

43. Respondents argue that, because they have been rejected, the alternative proposals are irrelevant to the matters now in dispute. This is misconceived. Respondents' proposals represent critical contemporaneous evidence of Respondents' understanding of the correct interpretation and implementation of the price adjustment mechanism at the time of contracting. Nothing could be more relevant. The explanation of Respondents' pre-contractual behaviour may be found in one of his witnesses, Mr. Large, stating that "*the competition among the bidders was very intense and tough one, and the Joint Venture was eager to win*" (Statement of Defence, Appendix A, page 5).

44. Respondents may not truly believe, as they have asserted (Position Paper of 17 October 2004, C-6, para. 13, page 2), that the non-adjustable component in the formula contained in Sub-Clause 70.3 (fixed at 15%) represented the Advance Payment. Were it so, they would have had to increase that component to 25% in the formula when they proposed to increase the Advance Payment from 15% to 25% and would have had to submit new weightings allocable to the remaining components since the sums of all components in the formula must always add up to 1. This contention would in any case conflict with Respondents' insistence that there is "*no relation between the interest-free advance payment and price adjustment*" (C-6, para. 18, page 2).
45. Contrary to Respondents' contention, the Employer/Consultant have not concluded that there was a contradiction in the wording of Sub-Clause 60.1 (i) and Sub-Clause 70.6 so that the sequence of items in Sub-Clause 60.1 should have been modified (Referral No. 2, C-4, page 6). As a matter of fact, the Consultant's letter of 20 October 2004, to which reference is made by Respondents, concludes that since there is no such contradiction "*there is no need for considering the issuance of a Memorandum of Understanding*" (C-16). This

conclusion finds support in the fact that none of the contractors that have been awarded the other three lots has suggested that Sub-Clause 70.6(a) is ambiguous or that the price adjustment mechanism should be applied other than as implemented by the Employer.

46. The DAB Majority Decision is a puzzling document. It contains a certain number of correct findings and a conclusion which is totally unrelated to such findings but is based on misconceived findings. Having defined the dispute as "*a matter of contract interpretation*" (C-5, para. 20, page 7), the DAB correctly states that:

- Egyptian law is the law applicable to the Contract;
- the meaning of Sub-Clause 70.6(a), "*if read alone and without any other consideration, appears not ambiguous*", the price adjustment having to be made after the deduction of the portion of the Advance Payment (C-5, para. 32, page 9);
- there is no ambiguity or inconsistency or contradiction in the words "invoice", "credit", "deduction" and "portion", as addressed in Respondents' contentions (C-5, para. 33, page 10);
- Sub-Clause 70.6(a) is not in line with standard FIDIC practice but "*the Parties were completely free to adopt any kind of mechanism for the mode of application for the price adjustment*" (C-5, para. 38, page 11);
- Respondents' alleged conflict between Sub-Clause 70.6(a) and Sub-Clause 60.1 is dismissed considering that "*each clause has a different purpose: GCC 60.1 sets out the*

mechanism of invoicing while GCC 70.1 to 70.7 sets out the change in cost, while GCC 70.6 defines more specifically the limitation for price adjustment” (C-5, para. 35, page 10).

47. Based on these findings, one would have expected the DAB to give its natural meaning to the language of Sub-Clause 70.6(a). On the contrary, the DAB premised its conclusion on a totally unrelated but misconceived finding. The critical paragraph in the decision reads as follows:

“The DAB is thus of the view that by having modified GCC 70.5, GCC 70.6(a) became erroneous: either GCC 70.6(a) should have been deleted or the word “after” in GCC 70.6(a) should have been replaced by “before” (C-5, para. 53, page 16).

The foregoing conclusion is based on the following DAB’s findings:

“ The DAB notes from a factual point of view that initially there was no price adjustment during the first three years for this Contract and no problem would have occurred with the application of the price adjustment clause”.

“The repayment of the advance payment would have been expected within the first three years and the issue of the deduction of the Advance Payment before calculation of the price adjustment would not have occurred” (C-5, para. 47, page 13).

“The wording “limitation” used in the title [of Sub-Clause 70.6(a)] is understood by the DAB as a reference to the starting date of the price adjustment as indicated in GCC 70.1 and GCC 70.5 amended later on by Addendum No. 5. The DAB does not consider the wording as an overall limitation” (C-5, para. 32, page 9).

48. There is not one correct finding in these remarks.

First, there was absolutely no way the Contractor would have repaid the Advance Payment within the first three years of the Contract, as

evidenced, among other things, by the cash flows submitted by the Contractor both before and after signature of the Contract. Were the DAB's finding correct, Sub-Clause 70.6(a) would have been redundant since no price adjustment applies during the first three years according to Sub-Clause 70.1.

49. Equally mistaken is the DAB's view that the limitation under Sub-Clause 70.6(a) refers to the starting date of the price adjustment. This is clearly contradicted by the title ("Limitation for Price Adjustment") which, when read in the context of paragraphs (a) and (b), clearly means a limitation of the Contractor's entitlement to price adjustment, the word "only" in paragraph (a) emphasizing this understanding.
50. In its decision, the DAB refers to an inconsistency between Sub-Clause 70.3 and Sub-Clause 70.6 (C-5, para. 51(i), page 15). It mentions that if the intention was to exclude the amount of the Advance Payment from the scope of the price adjustment mechanism, the drafter would have built item 60.1(i) (repayment of the Advance Payment) into Sub-Clause 70.3 formula.
Even if the drafter could have proceeded as suggested by the DAB, it elected a different but unambiguous and non-conflicting process,

namely to provide for a general rule under Sub-Clause 70.3 and for exceptions under Sub-Clause 70.6(a).

51. Other findings by the DAB are also mistaken or irrelevant. It is the case of the alleged "absence of reaction of the Parties" to a two-year old provision. The allegation is mistaken since the Employer had indicated at the tender stage its interpretation of this provision and the Contractor had admitted its knowledge and understanding of the Employer's interpretation and application of the price adjustment mechanism, including Sub-Clause 70.6 (a).
52. Respondents' alternative construction of the Price Adjustment under Sub-Clause 70.6(a) seeks nothing less than to rewrite the Contract. There is no legal basis on which this might be adopted.
53. Respondents counterclaim should be rejected. As a corollary, the Tribunal should order Respondents to pay Claimant the sums representing the amount paid to Respondents in compliance with the erroneous DAB's decision of April 2006. Respondents' claim for interest for late payment of the Price Adjustment differential is to be rejected since the Employer paid said differential within the time limit set by Sub-Clause 60.2. Furthermore, it were Respondents that

delayed referring to the DAB in February 2006 a dispute that had arisen in June 2004.

b) *Claimant's prayer for relief*

54. In the light of all the foregoing, Claimant prays the Tribunal to award it the following relief:

"First: to vacate the DAB's decision of 26 April 2006; AND

Second: to order that the price adjustment formula set out in Sub-Clause 70.3 apply only to the amounts invoiced under Sub-Clause 60.1(c) and, if applicable, 60.1 (d) and 60.1 (e), after deducting the amount of the Advance Payment for the relevant period; AND

Third: to order Respondent to pay Claimant the difference between, on one hand, all sums paid by Claimant to Respondent, on account of price adjustment, in compliance with the DAB's decision of 26 April 2006, and, on the other, the sums properly due to Respondent under that same heading pursuant to "Second" above, as particularized in the updated C-27 (to be further updated in due course if need be); AND

Fourth: to order Respondent to pay the Employer's costs associated with these proceedings and the proceedings before the DAB; AND

Fifth: to order Respondent to pay Claimant interest on all the foregoing claimed sums at such rate and for such period as to the Tribunal shall appear just; AND

Sixth: to dismiss Respondent's counterclaims in their entirety;" AND

Seventh: Such other or further relief as the Tribunal may deem appropriate

(Claimant's Post-Hearing Memorial dated 18 June 2007, pages 62 and 63)

B. Respondents' position and prayer for relief

a) Respondents' position

55. According to Respondents, the dispute before this Arbitral Tribunal regards Claimant's attempt, through interpretation of one unclear contractual provision regarding Price Adjustment, to reduce by about 15% the adjustment of the contractual price for changes in costs. In fact, according to Claimant the Price Adjustment should not be calculated by applying the formula in Clause 70 to the full value of the works but rather to such value less the amount of the Advance Payment. No economic rationale is suggested for this deduction, which would be additional to the 15% non-adjustable portion already provided by the Adjustment formula.
56. Furthermore, applying the Adjustment factor to an amount equal to the works value minus the Advance Payment repayment is equivalent to deducting an Advance Payment repayment revised pursuant to the Price Adjustment factor. This would result, in case of a rise in costs, to applying a positive interest to the Advance Payment, although it was agreed that the same was free of interest, so that Respondents would repay more than they have received for the Advance Payment.

57. According to Respondents, Claimant's position relies on a poorly grounded construction of an ill drafted contractual provision openly contradicting all other provisions as well as the Parties' intent when entering into the Contract. The purpose of Clause 70 is in fact to neutralise the impact of changes in the construction costs, thus ensuring that the Employer and the Contractor pay and receive no more but no less than the exact value dealt for in the Contract. It is crystal clear that contractual provisions, and particularly the Adjustment formula in Sub-Clause 70.3, must provide full compensation to the Contractor as stated in Sub-Clause 70.2. This provision does not contemplate the present situation where the scope of the Adjustment formula would be limited.
58. The dispute arose in July 2004 when the Employer refused to approve the Contractor's bi-monthly invoice no. 12, i.e. the second invoice incorporating an amount for repayment of the Advance Payment. It was the first time that the Employer alleged that Price Adjustment should be determined after deduction of the Advance repayment, while it had previously approved, as requested by Sub-Clause 60.1, a format of invoice according to which Price Adjustment was to be calculated before any deduction for repayment of the Advance Payment.

59. Following submission by the Employer on November 27, 2005 of its decision on the manner Price Adjustment should apply and Sub-Clause 70.6(a) be understood, Respondents referred the issue to the DAB requesting an answer to the following question: *"how the price adjustment provisions have to be applied"*.
60. By majority the DAB decided in April 2006 that the word "after" in Sub-Clause 70.6(a) should be replaced by the word "before" so that *"price adjustment will only be made to the amounts invoiced by the Contractor before deduction of the portion of the Advance Payment to be credited by the Contractor"* (*supra*, para. 6)
61. Claimant did not *"give effect forthwith"* to the DAB's decision, as prescribed by Sub-Clause 67.3, since it did not pay the interests for late payment due pursuant to Sub-Clause 60.4(a)(c), which were claimed by Respondents in their invoice No. 24 (supplement) (Exhibit R-5).
62. The dispute being brought to arbitration, Respondents concur with Claimant that the Tribunal has *"full power to open, review and revise any decision of the Dispute Adjudication Board"* pursuant to Sub-

Clause 67.7 and that neither Party is "*limited to the evidence or arguments previously put before the Dispute Adjudication Board to obtain its decision*".

63. Respondents therefore proceeded with a full discussion of the issue at stake, mentioning that the team that acted for Respondents before the DAB had not been involved in the negotiation of the Contract. The position expressed before the DAB may not therefore be deemed to reflect the Contractor's intention at the time it entered into the Contract, such intention to be rather gathered from the witnesses offered in these proceedings, Messrs. Large, Petit and Rolland, who were all involved in the project and, as to Mr. Large, in the Contract negotiations.
64. Contrary to Claimant's main submission, Sub-Clause 70.6(a) is ambiguous and needs construction.
- First of all, Claimant's reliance on the heading of this provision is misplaced since, as provided by Sub-Clause 1.2, the heading is not part of the Conditions and shall not be taken into consideration in the interpretation thereof. More importantly, Claimant misconceives the purpose of Price Adjustment, which is not to provide the Contractor with an "*entitlement to price escalation*" but rather to guarantee both

Parties that the value of the works shall not be affected by rises and falls in the construction costs.

65. As demonstrated by Claimant's analysis and research for nearly each word in the provision, its construction of Sub-Clause 70.6(a) is not a literal interpretation. It cannot therefore rely on Article 150 ECC, as it does, since this law provision requires that the wording of a contract be clear in order to exclude any interpretation.

Since Sub-Clause 70.6(a) is equivocal, failing the Parties' agreement as to its meaning, the Arbitral Tribunal is required by both Egyptian law and the applicable general principles of law, as expressed by Article 4.1 of the UNIDROIT Principles, to interpret its wording by establishing the common intent of the Parties when they entered into the Contract.

66. Pursuant to Article 150 ECC, the Arbitral Tribunal must principally *"take into account the nature of the transaction as well as that loyalty and confidence which should exist between the parties in accordance with commercial usage"*.

The contractual context of Sub-Clause 70.6 and the rationale behind the surrounding provisions in the Contract disprove Claimant's construction of the Price Adjustment mechanism. The rules of interpretation provided by International Principles of law are not

radically different. Pursuant to Article 4.3 of the UNIDROIT Principles, the Tribunal must consider the circumstances including, in particular, the preliminary negotiations, the conduct of the parties subsequent to the conclusion of the Contract, the nature and purpose of the Contract and the meaning commonly given to terms and expressions in the trade concerned and usages. The Parties' conduct both after and before the execution of the Contract as well as the international practice in the construction field confirm the interpretation of the Contractor.

The Arbitral Tribunal should be guided also by the "*contra proferentem*" rule, as embodied in Article 4.6 of the UNIDROIT Principles: "*if contract terms supplied by one party are unclear, an interpretation against that party is preferred*". It is not disputed that the General Conditions of the Contract, including Sub-Clause 70.6(a), were drafted and provided by the Employer. Moreover, it will be established by the testimony of Mr Large, one of the Joint Venture's negotiators, that the provision was never discussed prior to the execution of the Contract. The Employer should therefore bear the consequences of an ill-drafted provision.

67. Claimant's interpretation of Sub-Clause 70.6(a), apart from the internal inconsistency of this provision, makes it inconsistent with other provisions of the Contract.

Thus, regarding Sub-Clause 60.1, the request that items be taken into account in a particular sequence does not mean that they must be physically listed pursuant to that sequence in the Contractor's bi-monthly invoices. What is requested in order to comply with the sequence listed in Sub-Clause 60.1 and what is actually respected in the Parties' agreed format of invoices, is to consider each item in the sequence listed therein in the process of calculating the net amount due to the Contractor.

68. Item (a) and item (b) of Sub-Clause 60.1 must necessarily be considered first, and in that sequence, in order to calculate item (c) which is obtained by deducting (b) from (a). Items (d) and (e) must be added to (c) prior to determining (f) if one is to comply with Sub-Clause 70.3. Item (g) comes logically after item (f), since it is not considered when determining (f) and before items (h) and (i). Pursuant to Sub-Clauses 60.5 and 60.7 items (h) and (i) are not amounts that must be paid to the Employer (contrary to item (g)) but are "deducted" or "withheld" from the net amounts due to the Contractor, as determined by summing up items (a) to (g).

Claimant is right to submit that the purpose of Sub-Clause 60.1 is not to set forth the Parties' rights with respect to reimbursement of the Advance Payment and Price Adjustment. Those issues are primarily dealt with in, respectively, Sub-Clause 60.7 and Clause 70. Clause 60.1 is nevertheless a strong indication of the Parties' common intention that Price Adjustment will be determined by application of the Adjustment factor to the value of the work, without deducting Advance repayment, and deserves strong consideration when one is confronted to the ambiguity of Sub-Clause 70.6(a).

69. Sub-Clause 60.7 provides that the Employer shall make an interest free Advance Payment against invoice to the Contractor in an amount equivalent to 15% of the Contract Price less Provisional Sums. This provision is unambiguous. Respondents concur with Claimant's statement that the Advance Payment is not subject to Price Adjustment either, "*because price adjustment and advance payment are conceptually distinct*" (Statement of Claim, para. 53).
70. However, Claimant's construction of Sub-Clause 70.6, consisting in applying the Price Adjustment factor of Sub-Clause 70.3 to the works value after deduction of the Advance repayment, results in submitting the repayment of the Advance Payment – but not the Advance

Payment itself – to Price Adjustment, so that the Contractor would *de facto* repay more than the nominal amount of the Advance Payment and the Employer would receive an interest on that nominal amount. Thus, there is clearly a contradiction between Claimant's construction of Sub-Clause 70.6(a), which results in an interest in disguise, and Sub-Clause 60.7, which provides for an advance free of interest.

71. Claimant submits that Clause 70 governs Price Adjustment in its entirety (Statement of Claim, para. 32). In its opinion, that Clause contemplates three kinds of limitation to the Contractors' entitlement to Price Adjustment: (1) Sub-Clause 70.1 would limit Price Adjustment to specific costs; (2) Sub-Clause 70.2 would exclude the right to any price adjustment outside the entitlement specified in the Contract; and (3) Sub-Clause 70.6 would restrict the Contractor's right to Price Adjustment during repayment of the Advance Payment (Sub-Clause 70.6(a)) and culpable delays (Sub-Clause 70.6(b)).
72. This presentation of Clause 70 and the Price Adjustment mechanism is misleading. Far from limiting the so-called Contractor's rights to Price Adjustment, Sub-Clauses 70.1 and 70.2, read together, actually show that the purpose of the mechanism is to ensure both Parties – not solely the Contractor – that it will pay and receive *full compensation*

for the works for any rise and fall in construction costs and that such purpose must primarily be reached through the mechanism of Price Adjustment. In the case some rises and falls could not be covered this way, the Contractor is requested to include amounts in the unit rates and prices, in order to cover that contingency, to his benefit in the case of rises, but also to the Employer's benefit if falls are contemplated.

73. The Contractor has done so in the offer it submitted in the context of the first tender. The simple fact that no such precaution was adopted with respect to Sub-Clause 70.6(a) is a good indication that the Contractor did not consider, nor accepted, that the full compensation mechanism provided by Clause 70 would be restricted during the period of reimbursement of the Advance Payment. In accordance with the principle of full compensation, no deduction for reimbursement of the Advance Payment is considered in Sub-Clause 70.3: Price Adjustment is to apply to the full value of the Works (Sub-Clause 60.1(c) and possibly (d) and (e)), not to the value of the works less the amount of the Advance Payment (Sub-Clause 60.1(c), (d) and (e) less Sub-Clause 60.1(f) [sic]).

74. Accepting Claimant's proposed interpretation of Sub-Clause 70.6(a) would create a contradiction between Clause 70 and Sub-Clause 60.7 as well as an inconsistency within Clause 70, in particular because of the contradiction between the definition of the scope of Price Adjustment in Sub-Clause 70.3 (60.1(c) + 60.1(d) + 60.1(e)) and the implications of Claimant's construction of Sub-Clause 70.6(a), namely a change of the scope of Price Adjustment in: 60.1(c) + 60.1(d) + 60.1(e) – 60.1(f) [sic].

Furthermore, Claimant's proposed interpretation in Sub-Clause 70.6(a), namely adjusting the value of the works less 15% of the Contractual Price, would result in changing radically the contractual purpose of Price Adjustment. It would not ensure full compensation of changes in costs, in accordance with Sub-Clauses 70.1, 70.2 and 70.3, but would rather cover 85% of the works value changes in costs, to the detriment of both the Employer and the Contractor. That would not be an exception provided for specific circumstances that should not occur but a modification to the rule pertaining to apply whatever the circumstances.

75. The construction of Sub-Clause 70.6 (a) proposed by Claimant, namely: the scope of Price Adjustment is limited to the value of the works after deduction of the amount of the Advance Payment, does

not fit with the normal meaning of those two expressions. It does not fit either with other relevant provisions of the Contract and directly contradicts the spirit of the Contract as reflected in Sub-Clause 60.1 (sequence of invoicing), 60.7 (Advance Payment free of interest), 70.1 and 70.2 (full compensation for rises and falls in costs) as well as the wording of Sub-Clause 70.3 (scope of the Price Adjustment).

Therefore, Claimant's construction is unacceptable and must be rejected.

76. This is not the case of Respondent's interpretation, which is as follows. Contrary to what is contended by Claimant, in Sub-Clause 70.6(a) the "*amount invoiced by the Contractor*" cannot solely refer to "*the amount that ordinarily qualify for price adjustment*" but rather encompasses *every* amount to be invoiced by the Contractor, referring therefore to all items mentioned under Sub-Clause 60.1 plus the invoice for the Advance Payment. Additionally, "*the portion of the Advance Payment to be credited by the Contractor*" must be understood as "*the amount that is still to be repaid in further bi-monthly invoices*".
77. Alternatively, in the hypothesis where the Arbitral Tribunal would not confirm Respondents' interpretation of Sub-Clause 70.6(a), it would

have to look for the common intention of the Parties in the light of the principles clearly set in the Contract, namely: full compensation for rises and falls in costs through the Price Adjustment mechanism and free-of-interest Advance Payment. Accordingly, the Contractor cannot refund more than the initial amount it received as Advance Payment.

78. A way to reach this result, other than the exclusion of the Advance Payment and its repayment from the scope of the Price Adjustment, is to include both the repayment (as suggested by Claimant) and the Advance Payment in the scope of the Adjustment.

According to that method, the initial amounts paid by the Employer as Advance Payment are submitted to Adjustment. The amount of the Advance Payment is further increased with each invoice by an amount corresponding to the impact of rises and falls in costs on the outstanding balance of the Advance Payment (revised amount of the Advance Payment minus repayment) since the last invoice. As shown by the chart provided in Mr. Rolland's Witness Statement, in the case of a contractual Advance Payment of 150, the Employer would pay 182,99 and be refunded of 182,99. Although the above method is consistent with the contractual principles of full compensation and free-of-interest Advance Payment, it is inconsistent with the Contractual scope of Price Adjustment as defined in Sub-Clause 70.3.

79. Another construction of the provisions regarding Price Adjustment and repayment of the Advance Payment is therefore suggested. The amount refunded with each bi-monthly invoice is determined, as suggested by Claimant, by submitting to Price Adjustment an amount equal to 30% of the works value for the period pursuant to Sub-Clause 60.7. However, repayments stop when the amount deducted from the bi-monthly invoices as refunding of the Advance Payment equals, after Adjustment, the net value of the Advance Payment, without Adjustment.

This construction is in line with the principle of full compensation in Clause 70 and with the principle of an Advance Payment free of interest in Sub-Clause 60.7.

80. Respondents' interpretation of Sub-Clause 70.6(a) is supported by the international practice which confirms that Price Adjustment applies to the works performed without deduction of the repayment of the advance payment. This has been acknowledged by Claimant in its submissions before the DAB and is not denied in the Statement of Claim. However, Claimant argues that because the Contract is submitted to Egyptian law and because Sub-Clause 70.6(a) should be clear, international practice should be ignored by the Arbitral

Tribunal. However, the provision is ambiguous and reference to international practice is therefore useful to ascertain the Parties' common intention, as indicated by Article 4.3 of the UNIDROIT Principles.

81. Both FIDIC General Conditions of 1987 and FIDIC Conditions of Contract for Construction dated March 2006 exclude deduction of the Advance Payment repayment from the scope of Price Adjustment.

Similarly, under the World Bank practice there is no limitation to the Price Adjustment calculation consisting in a deduction of the repayment of the Advance Payment, except in case of delays in the completion of the Works (similar to Sub-Clause 70.6(b)).

In view of the international practice, it is clear that Sub-Clause 70.6(a) cannot be construed as reflecting a common intention of the Parties to deduct the amounts of the Advance Payment refund from the scope of Adjustment, as claimed by the Employer.

82. In paragraphs 82 and seq. of the Statement of Claim, Claimant alleges that the Contractor had a clear understanding of what would be the Price Adjustment mechanism according to Claimant and therefore agreed to that mechanism before entering into the Contract. Claimant relies on the commercial proposals made by the Contractor in

February and March 2002 during Pre-Award negotiations. According to Claimant, *"the increase in the percentage payable by way of advance payment can result in savings on the amount payable in respect of price adjustment formula"* (Statement of Claim, para. 92). Therefore, the proposals would be evidence that *"Respondents understood and accepted the Employer's present interpretation and implementation of the relevant Contract provisions at the time of contracting"*; furthermore, *"Respondent is solely responsible for the consequences of its supposed failure properly to apprehend the clear terms of the Contract"* (Statement of Claim, para. 96).

Claimant's argumentation is disingenuous.

83. The Contractor's proposals of 2002 were merely commercial proposals, as evidenced by the Witness Statement of Mr. Large. Their purpose was to propose various benefits for both Parties. Respondents add that they were never aware of the Employer's interpretation of Sub-Clause 70.6(a). As testified by Mr. Large, the suggestion by the Employer's representatives during the negotiations that the scope of the Adjustment should be limited to the Advance repayment was never linked to Sub-Clause 70.6(a), the issue of the interpretation of such Sub-Clause having not been raised during the discussion.

84. No implicit acceptance of the Price Adjustment mechanism can be inferred from the Contractor's proposal. In no way such proposal demonstrated a common understanding of Sub-Clause 70.6(a) but only meant that, in case of – and solely in case of – agreement to the Contractor's proposals, the position of the Employer's negotiators would have been accepted. Indeed, if the Contractor was, at that time, willing to accept to deduct the Advance Payment from the scope of Price Adjustment, as proposed by Employer's negotiators, it was solely grounded on the advantages that it would have gained by the increase of the Advance Payment in terms of cash reserves.

Moreover, it does not result from the Contractor's understanding of the mechanism that was proposed by the Employer's representatives that the Parties had linked such mechanism to Sub-Clause 70.6(a), no reference to that Sub-Clause being made in the Contractor's proposals.

85. Respondents' interpretation of Sub-Clause 70.6(a) is not solely conform to international practice; it is further corroborated by the Parties' practice since the execution of the Contract. The invoice format agreed upon between the Parties at the commencement of the works expressly indicated that Price Adjustment would be "*calculated*

on (7)". That is the line in bi-monthly invoices that aggregates the three items Works, Variation and Material on Site and Plants for the Permanent Works (Exhibit R-3). It was therefore understood by both Parties that the deduction for refunding of the Advance Payment would not be considered in the calculation of the Price Adjustment. The invoice format was approved by the Employer in accordance with the provision in Sub-Clause 60.1, as evidenced by the Witness' Statement of Mr. Rolland who was Project Manager on Site for the Contractor at that time.

86. Moreover, in contrast to Claimant's allegation that Price Adjustment is to be calculated on the amount of the Work less deduction of the repayment of the Advance Payment, the Employer has approved every invoice submitted by the Contractor in accordance with the above format up to invoice no. 12, without any reservation regarding the calculation of Price Adjustment. In particular, it agreed with the amount of Price Adjustment in invoice no. 11, which was the first bi-monthly invoice that incorporated an amount for repayment of the Advance Payment, although Price Adjustment had been calculated pursuant to the formula in Sub-Clause 70.3. The Employer's conduct after the conclusion of the Contract is therefore another positive indication that the Parties had agreed that repayment of the Advance

Payment would not be deducted from the value of the costs for calculation of Price Adjustment.

87. A counterclaim is raised by Respondents in their Statement of Defence, as described hereinafter. Because of its improper construction of the Contract, Claimant has unduly delayed payment of a portion of the Price Adjustment due to the Contractor in the amounts of EGP 14.411.844,98 and Euros 1.761.844,92. Those amounts have been paid in August 2006 in compliance with the DAB's decision. However, Claimant has denied the Contractor's legitimate request in invoice no. 24 (supplement) to be paid interests for late payment in accordance with Sub-Clause 60.4 (A) (c). In August 2006, when the Employer finally paid the amounts due to the Contractor, interests for late payment amounted to EGP 1.715.312 and Euros 51.858. Respondents therefore request that Claimant be ordered to pay Respondents interests for late payment in the said amounts. Subsidiary, if the Tribunal rejects Respondents' main interpretation of Sub-Clause 70.6(a) but accepts one of the two alternative interpretations suggested by them (*supra.*, paragraph 78 and 79) the Tribunal is requested to put the Parties in the financial condition where they would have been if any of those two alternatives had been implemented.

88. The Counterclaim is restated. On one side, in fact, the Employer wrongfully disapproved an invoice, thus causing a delayed payment, a fact which may not be raised as an excuse. On the other, Claimant fully participated in the discussions before the dispute was referred to the DAB, thus contributing to the delay.

b) Respondents' prayer for relief

89. Based on the foregoing, Respondents apply for the Tribunal to:

"Principally

- (i) Deny all Claimant's request;
- (ii) Hold that Price Adjustment is to be determined pursuant to the provision in Sub-Clause 70.3 without any prior deduction of the repayment on the Advance Payment;
- (iii) Order Claimant to pay interest for late payment in the amount of:

- EGP 1.715.925,01 and Euros 53.238,43

Alternatively

- (iv) Determine how the Parties should construe Sub-Clause 70.6(a);
- (v) Put the Parties in the financial condition where they would have been if Sub-Clause 70.6 had been properly construed; and:
 - In the case the Tribunal adopts Respondents' alternative construction no. 1 order Claimant to pay interest for late payment in the amount of EGP4,576,561.04 and Euros 108.190,10;
 - In the case the Tribunal adopts Respondents' alternative construction no. 2, hold that Claimant is entitled to the payment of interests in the amount of EGP 20,261.07 and Euros 1.230,09;

In all events

- (vi) Order Claimant to pay Respondents interests, at any rate that the Tribunal may deem fit, on any amount that the Tribunal will order Claimant to pay, as from the date of the Award until full compliance by Claimant;

(vii) Condemn Claimant to pay all costs incurred by Respondents in this arbitration, including costs to present its case before the Tribunal and before the DAB."

(Respondents' Post-Hearing Brief dated 18 June 2007, pages 24 and 25)

IV DISCUSSION

A. General remarks

90. Few remarks of a general character appear in order before deciding on the Parties' respective prayer for relief.

The Parties' position have been clearly stated. The Contractor considers that Price Adjustment should be applied on the value of the works before any deduction for the Advance Payment while the Employer's position is that it should be applied after deduction of the Advance Payment.

Both Parties agree that Advance Payment (Sub-Clause 60.7) and Price Adjustment (Sub-Clause 70) are two independent concepts. They also agree that the Advance Payment, as well as its reimbursement, is interest free pursuant to Sub-Clause 60.7 and is not submitted to Price Adjustment. This is not only logical but is a trade usage of the construction industry. As long as the Parties agree that Advance Payment and Price Adjustment are two independent concepts, these are completely different matters which have different contractual functions. Indeed, (i) the Advance Payment is a financial facility for the Contractor, interest free and not subject to price adjustment so that

the Contractor has to reimburse the exact amount it has received, and
(ii) the Price Adjustment is a procedure accounting for fluctuations in construction costs during the execution of the works.

91. The problem which is at the core of these proceedings arises because of the apparent opposition between the above concepts and Sub-Clause 70.6(a) according to which

“Price Adjustment will only be made to the amounts invoiced by the Contractor after deduction of the portion of the Advance Payment to be credited by the Contractor”.

As it will be shown (*infra*, para. 97), Sub-Clause 70.6(a), when considered without regard to other provisions of the Contract, is clear, its meaning being unambiguous. However, it seems to contradict not only the Parties' behaviour at the inception of its contractual application but also other provisions of the Contract, in particular Sub-Clause 60.1 regulating bi-monthly invoicing of amounts to which the Contractor considers himself to be entitled and Sub-Clause 60.7 providing for a free-interest Advance Payment.

92. This contradiction is made more evident by the fact that Sub-Clause 70.6(a) is an unusual provision in respect of FIDIC standard form of construction contracts, as recognized by Claimant (*“the drafter of the Contract deliberately inserted a new, rarely found provision ...”* :

Post Hearing Memorial, para. 2; *"the drafter.... inserted the new clause 70.6(a) to vary the result achieved by the standard FIDIC form..." ibidem*, para. 175). The standard form of contract, as so integrated, was made by the Employer an integral part of the tender documents. Contrary to the normal practice whereby a change to the general conditions is made part of the special conditions, the latter prevailing over the former in case of conflict,³ the Employer has chosen to add to the general conditions a totally new provision, Sub-Clause 70.6(a).

93. However, when doing so the Employer has failed to take care of reconciling the new provision with other provisions of the Contract in order to avoid possible inconsistencies. To that extent, only the Employer is to be blamed for having given rise to the problem of interpretation which is at the heart of the present dispute. The more so if one considers that Sub-Clause 70.6(a), when interpreted as contended by the Employer, provides for a non-adjustable portion in contractual payment additional to the value of 0.15 already contemplated as non-adjustable by the adjustment formula of Sub-Clause 70.3. While the said value of 0.15 finds its rationale in the

³ Part I – General Conditions of the Contract, second sentence, reads as follows: *"In case of inconsistency between the conditions contained in Part I and those in Part II [Special Conditions], the conditions of Part II shall prevail"*.

circumstance that certain expenditures are not subject to fluctuation in cost (see R-12, page 125, footnote 15 in the box), as correctly pointed out by Respondents the provision of Sub-Clause 70.6(a), as interpreted by the Employer, has no economic rationale being simply an additional economic burden imposed on the Contractor.

94. The Tribunal is certainly not disputing the Employer's right to modify the General Conditions of the Contract in a competitive bidding in view of enhancing the economic benefit accruing to it under the Contract. It only wishes to underline that if a dispute has arisen regarding the application of Sub-Clause 70.6(a), Claimant bears its part of responsibility for having given rise to doubts of interpretation by submitting to the tenderers a badly coordinated text of Contract.
95. In light of the foregoing, the majority of the DAB took a logical and reasonable decision being composed of Engineers with extensive knowledge of construction practice. However, they went wrong in that they could not simply change the wording of Sub-Clause 70.6(a) without analysing its content in the context of the other provisions of the Contract, based on the criteria of contractual interpretation set by Egyptian law.
- This is the task that the Tribunal intends now to accomplish.

B. Analysis of individual Sub-Clauses⁴

i. Sub-Clause 60.1

96. This provision (reproduced *supra*, para. 26) is clear in itself. Indeed, it is a standard clause appearing in various form of construction contracts, including the FIDIC form adopted by the Employer. The Clause lists, in particular, the items to be included in the Contractor's invoice and their sequence.

ii. Sub-Clause 70.6(a)

97. Also the wording of this Sub-Clause is clear in itself.
- Dealing with Price Adjustment, the expression "*amounts invoiced by the Contractor*" cannot but refer to the amounts payable to the Contractor under Sub-Clause 60.1 and made subject to the adjustment formula of Sub-Clause 70.3. The Advance Payment under Sub-Clause 60.7, even if payable only against an invoice by the Contractor, is not an "*amount invoiced by the Contractor*" for purposes of Sub-Clause 70.6(a).

The expression "*portion of the Advance Payment to be credited by the Contractor*" is the amount of repayment of the Advance Payment falling due in the relevant bi-monthly period; the word "*credited*" referring to the amount of the Advance Payment to be deducted from

⁴ The analysis is limited to those provisions of the Contract that have attracted greater attention from the Parties.

the Contractor's bi-monthly invoice in accordance with Sub-Clause 60.7 (3rd sentence). Price Adjustment should therefore be made after deducting the amount of the repayment of the Advance Payment due in any given bi-monthly period.

C. Consistency of Sub-Clause 70.6(a) with other Clauses.

i) Sub-Clause 60.1

98. The Parties agree that although Sub-Clause 60.1 and Sub-Clause 70.6(a) have equal value for purposes of contractual interpretation their scope is different. Sub-Clause 60.1 defines the mechanism of invoicing by the Contractor, showing in each line item of the invoice format the amount or value calculated by reference to another Sub-Clause of the Contract. The Parties agree that only the Sub-Clause to which reference is made in each line item defines the substantive rights and obligations of the Parties. Thus, as correctly pointed out by Respondents, *"the Parties' rights with respect to reimbursement of the Advance Payment and Price Adjustment are primarily dealt with in respectively Sub-Clause 60.7 and Clause 70"* (Statement of Defence, para. 49). Sub-Clause 70.6(a), which is part of Clause 70 dealing with "Changes in Cost and Legislation", provides for a limitation to Price Adjustment which is regulated by the other provisions of Clause 70.

Sub-Clause 60.1 is not consistent with Sub-Clause 70.6(a) inasmuch as, in order to take account of the limitation for Price Adjustment provided by the latter Sub-Clause, it should have provided for the deduction for the Advance Payment repayment listed in item (i) to precede, rather than follow, item (f).

99. Claimant recognises this lack of consistency when it invites the Tribunal “*to investigate alternative interpretations of the relevant wording that would reconcile, and give effect, to both parts of Sub-Clause 60.1*” (Post-Hearing Memorial, para. 128) or, in the alternative, to “*consider the possibility that the drafter simply failed to consider the implications of the introduction of the non-standard Sub-Clause 70.6(a) on the general statement found in the prefatory section of Sub-Clause 60.1*” (*ibidem*, para. 129).

ii) Sub-Clause 60.7

100. Pursuant to this Sub-Clause, the Advance Payment made by the Employer to the Contractor is free of interest, which means that the Contractor has to repay exactly the same amount advanced by the Employer at the beginning of the works. This is recognised by both Parties, which express this concept with the formula “*cash in, cash out, in equal amounts*” (Statement of Claim, para. 53; Statement of Defence, para. 51). Respondents contend, however, that applying Sub-Clause 70.6(a) literally leads to submitting the repayment of the Advance Payment to Price Adjustment (Statement of Defence, para.

53). As a result, no matter whether the Adjustment is due to a rise or a fall in costs for any given bi-monthly period, the total amount of the repayment may at the end be different from the amount of the Advance Payment, contrary to the Parties' common understanding of Sub-Clause 60.7.

As we shall see, this is not the Tribunal's reading of Sub-Clause 60.7.

iii) Sub-Clause 70.1

101. This Sub-Clause sets a general principle governing Price Adjustment while Sub-Clause 70.6(a) sets a limitation to such principle. Accordingly, there is no conflict between the two Sub-Clauses.

iv) Sub-Clause 70.2

102. This Sub-Clause provides that if Price Adjustment does not permit "*full compensation*" for the rise or fall in costs, the Contractor shall be deemed to have taken into account such shortfall when fixing unit rates and prices.

No conflict exists therefore between this Sub-Clause and Sub-Clause 70.6(a), even if one of the reasons for the shortfall is the application of the Price Adjustment limitation under Sub-Clause 70.6(a).

v) *Sub-Clause 70.3*

103. There is no conflict with Sub-Clause 70.6(a) since this Sub-Clause provides for the general formula for Price Adjustment. Sub-Clause 70.6(a) sets instead a limitation for Price Adjustment applicable for the period of time during which repayment of the Advance Payment takes place.

D. **The contractual interpretation**

104. Even if the wording of individual Clauses is clear and unambiguous, the conflict between Sub-Clause 70.6(a) and Sub-Clause 60.1 (*supra*, para.98) and Sub-Clause 60.7 (*supra*, para. 100) makes the Contract unclear. The issue at the heart of these proceedings is therefore one of contractual interpretation.
105. The main provisions of the Egyptian Civil Code ("CC") dealing with interpretation of contracts are Articles 150 and 151. They read as follows:
- Article 150:
"When the wording of a contract is clear, it cannot be deviated from in order to ascertain by means of interpretation the intention of the parties. When a contract has to be interpreted, it is necessary to ascertain the common intention of the parties and to go beyond the literal meaning of the words, taking into account the nature of the transaction as well as that of loyalty and confidence which should exist between the parties in accordance with commercial usage".

Article 151:

"In cases of doubt, the interpretation shall be in favour of the debtor. The interpretation, however, of obscure clauses in a contract of adhesion must not be detrimental to the adhering party".

106. According to these provisions, therefore, if the wording of the contract is clear, it is a mandatory rule of law that the court is not allowed to deviate from its obvious meaning. But if the wording of the contract is, for any reason, unclear, the contract may be interpreted with a view to ascertaining the parties' common intention. Finally, if doubt still exists as to the parties' common intention, this doubt should, as a general rule, be resolved in favour of the obligee.

The following paragraphs will summarise the rules of interpretation in the different situations, to the extent that this is relevant to the issue to be decided by the Tribunal.

107. This summary reflects the essence of the substantially identical views of the most outstanding Egyptian legal writers and commentators, such as Al-Sanhoury ("Al-Waseet", Civil Law, Vol. 1 (1981)), S. Morcos ("Al-Wafi", Civil Law, Vol. 2 (1987)), H. El-Ahwany ("General Theory of Obligation", Vol. 1 (1995), cited also by Claimant: Post-Hearing Memorial, para. 29), M. Kamal Abdel-Aziz ("Commentary on the Civil Code" (2003)). The literature on this rich subject relies heavily on the extensive and consistent decisions of the Court of Cassation. The literature and case law appear so interrelated

that it is not necessary to quote each separately. However, it appears that a few judicial decisions must be singled out not only for their detailed holdings but because of their close and specific relevance to the questions at hand.

108. As mentioned before, according to the first paragraph of Article 150 CC, if the wording of the contract is clear, it cannot be deviated from by means of interpretation. This is a mandatory rule. The court must assume *prima facie* that the clear wording of the contract truly reflects the meaning intended by the parties. The court cannot just deviate from the clear wording unless the circumstances of the case lead it to such deviation based on strong justifications.

In this respect the Court of Cassation, followed by all legal writers and commentators, has held that “*clarity*” means “*clarity of the intention*” not just the mere “*clarity of the words*”. Therefore, the Court of Cassation, in many instances, has upheld the lower courts’ interpretation of the clear wording of contracts but only when the Court found that the circumstances justified such interpretation.

109. To the extent relevant to the solution of the issue in dispute, where each of the relevant conditions contains a clear wording each in isolation of the other, but they are inconsistent as between them (as in

the case of Sub-Clauses 60.1, 60.7 and 70.6(a)), the Court of Cassation specifically asserted that:

"... it has been consistently held by this Court that what is meant by clarity [in the meaning of Article 150/1 of the Civil Code], is the clarity of intention not the clarity of the wording. Thus the conditions of the contract may each appear clear in themselves but still inconsistency may occur between them so that the meaning that could be deduced from them becomes unclear. Therefore, when interpreting documents, the court should not rely on one particular condition to the exclusion of the others but the court has to consider the significance of the entirety of these conditions on the basis that they constitute an integral and solid unity... whereas it is clear from the appealed decision that the decision, in interpreting the lease contract in dispute stopped at clause 21 which prohibited subleasing and did not take into consideration clauses 1 and 2 which provide that the tenant is an active army officer... and that the purpose of the lease is to use the leased apartment as a lawyer's office without limitation, failing to be guided by the criteria defined by the law ... then this decision is in error and must be vacated for mistake in applying the law" (Court of Cassation, Decision of 27 December 1978, Appeal No. 1463/47, Reports, Year 29, p. 2053, cited as unpublished in Al-Sanhoury, cited *supra* in para. 107, p. 814, note 2). See also Al-Sanhoury, *supra*, in para. 107, p. 813, note 1, quoting a French Court of Cassation decision to the same effect, namely: *"despite the clarity of a provision, interpretation may still be necessary as in the situation where the contract contains two provisions, each of them is clear but a contradiction between them requires interpretation"*.

110. Without the need to go into further details on this subject, it appears that where a court is met, as the Tribunal does now, with a situation where *prima facie* inconsistency appears to exist between different clauses, all clearly worded, the court is allowed to interpret the contract. Pursuant to the second paragraph of Article 150, when a contract is to be interpreted, it is necessary to ascertain the common intention of the parties going beyond the literal meaning of the words.

It appears therefore that the essential purpose of the interpretation process is to ascertain the common intention of the parties. The law defines certain factors that should be used as guidance in the process of interpreting a contract, namely, the nature of the transaction, the loyalty and confidence that should exist between the parties in accordance with the common usage. Writers and the Court of Cassation decisions have added more rules of interpretation, either derived from Islamic jurisprudence or from the French doctrine and the Court of Cassation precedents.

111. The search for the Parties' common intention is mandated also by the arbitration clause of the Contract (*supra*, para. 8). Based on the literature and case law to the extent that they relate directly to the issue in dispute, certain rules may be identified that provide guidance in the process of interpretation of the Contract.

One of such rules is that, in principle, the different provisions of the contract should be used to interpret each other. Each provision must, therefore, be read as part of the whole contract (see the Court of Cassation's decisions quoted by Claimant's Post-Hearing Memorial, footnote 60). Furthermore, there may exist a provision of a general nature that is mentioned in one part of the contract but another provision (that comes in another, perhaps a later, part of the contract)

may contain a limitation that would serve to limit the scope or the generality of the earlier provision. Equally, one provision can be vague but another provision may clarify such vagueness.

112. In principle, if a contradiction or inconsistency occurs between two or more provisions of the contract, the court should make a true effort to reconcile them to the maximum possible extent, without violating the integrity of either provision, so that both provisions apply and make sense together. If this proves to be impossible, the court may select the provision that appears clear to it as truly intended by the parties to reflect their will, to the exclusion of the other provision (see, *e.g.*, Al Sanhoury, cited *supra* in para. 107, pp. 824-826).

In view of the fact that under Egyptian law the Tribunal is under an obligation to make a best effort attempt to reconcile the inconsistent conditions involved in the issue in dispute, it makes sense to consider Sub-Clause 60.1 as containing a rule of a general nature and Sub-Clause 70.6(a) as providing for a specific limitation to the general provisions of the former Sub-Clause. To this effect, both Sub-Clauses are kept but the specific limitation provided by Sub-Clause 70.6(a) should prevail over the generality of the provisions of Sub-Clause 60.1

113. The significance and effect of inserting Sub-Clause 70.6(a) to the otherwise standard Clause 70 of the FIDIC form of contract is made manifest by the Court of Cassation.

In its decision on 31 January 1983, the Court held that:

"... In the event that the parties used a printed model form of contract and they added to it – either in hand writing or by any other means – conditions that are inconsistent with the printed conditions, the added conditions must take precedence on the basis that they serve as a clear expression of the parties' intention. Whereas this is being so, and whereas it is established that the bill of lading in dispute, contained in its printed conditions a clause providing that the weight, measurement, quality, quantity, content and value are unknown; however, a term that was added in the form of a stamp, read "clean on board" indicating that the bill of lading is clean which apparently contradicts the printed condition and clearly indicates the parties' intention to cancel the printed condition and to apply the inserted condition..." (Court of Cassation, 31 January 1983, Appeal No. 832/48, Reports, Year 29, pp. 355-358).

114. In respect of the issue in dispute, it appears that there is a similarity between the bill of lading model form of contract (subject of the Court of Cassation's decision) and the FIDIC general conditions of contract after which both Clauses 60 and 70 of the Contract were modeled. The FIDIC form is also a model form with which both parties are quite familiar, so that bidders could be safely assumed to have recognised, at first blush, any deviation, deletion or addition effected by the Employer in the form offered to them, particularly in places where it matters the most, namely those regarding the contractor's entitlements.

115. The Tribunal is therefore entitled to consider that if the Parties have accepted, or are deemed to have accepted, these variations to the model form they must also be assumed to have realised their impact on the conditions of the model form that remain unchanged. By such deemed acceptance, the Tribunal is also entitled to find that, similarly to the situation in the Court of Cassation's decision cited above, the Parties are assumed to have clearly expressed their common intention to have these variations or additions take precedence over Sub-Clauses 60.1 and 60.7 of the FIDIC standard general conditions of contract.
116. Consistently with the provisions of Article 150(2) CC, writers assert that in verifying the common intention of the parties a court must be guided by the requirements of confidence and loyalty that must exist between the parties. They explain that the offeree must understand the meaning of the offer as required by the principle of loyalty. If the offer contains a mistake or suffers from lack of clarity and the offeree recognises such mistake or vagueness, or could have recognised them, then loyalty dictates that he should not exploit such mistake or vagueness. On the other hand, the offeree has the right to have confidence in the clear meaning of the terms offered by the offeror (see, e.g., Al-Sanhoury, cited *supra* in para. 107, pp 824-825).

117. Regarding the issue in dispute the facts are clear and indicate which rules and principles of interpretation are to be applied. The invitation to bid was extended to the Respondents among others. The general conditions of contract followed the FIDIC form but with variations including the addition of Sub-Clause 70.6 (a), which was inserted by the Employer under the title "Limitation for Price Adjustment". During the preaward discussions, the Employer's representatives advised Respondents' representatives that they interpret the inserted Sub-Clause 70.6(a) in the manner asserted now. Specifically, this means that the inserted Sub-Clause 70.6(a) was intended to serve as a limitation of the Price Adjustment and that such Adjustment shall be made only after deduction of the Advance Payment repayment.
118. Respondents made no comments or objections in that regard, although they understood what the Employer intended to achieve by adding Sub-Clause 70.6(a). In the "Application of Price Adjustment under the Contract" of January 2006 the Contractor stated the following:
- "It is true that, during pre-award discussions, in order to appreciate the effect of a possible modification of the amount of the Advance Payment (25% instead of 15%), the negotiators from the JV followed the interpretation of the Employer on Sub-Clause 70.6, and they considered in their calculation the amount of the Price Adjustment with which they had been provided ("based on the provisions advised by the Employer") (underlined by the Tribunal).*

By doing so, the JV representatives, in good faith, due to the lack of clarity of the Contract wording, did not question the interpretation made by the Employer of the relevant clauses, which appears to be in contradiction with the Contract” (Referral N. 2, C-4, p. 6).

It is based on the Employer’s interpretation of Sub-Clause 70.6(a) that Respondents prepared and submitted to the Employer alternative proposals for payment procedures, on 9 February and 2 March 2002 (C-11 and C-12, respectively).

119. While Respondents made several requests for clarifications and substantial amendments in the context of Clause 70 (in particular, gaining a considerable benefit through changing the starting date for effecting Price Adjustment), they made no request for clarifications or amendments in respect of Sub-Clause 70.6 (a), although realising that the Employer’s interpretation of certain clauses was *“in contradiction with the Contract”*.
120. The Contract, of which the Tender Documents form an integral part (as per Sub-Clause 5.2), is clear in allocating the risk and liability for contradiction, omission or obscurity:
- “2.3.3) The Tenderer affirms by submitting the Tender that he has examined carefully and is fully familiar with all the Tender Documents and that these documents will become an integral part of the Contract, and the Tenderer accepts without any reservation the terms and conditions in the Tender Documents.”*

"3.3.1) Any explanation or clarification of any uncertainty as to the true meaning of any portion of the Tender Documents needed by the Tenderer shall be requested by letter or facsimile to arrive not later than 28 days prior to the Tender submission date"

"3.3.2) Should any contradiction, omission or obscurity be discovered in the Tender Documents, the Tenderer must immediately notify the Employer and request clarification".

"3.3.5) The Employer will not assume any responsibility for any errors or omissions in the Tender Documents if the Tenderer has not requested explanation in due time."

Thus, the instructions to tenderers directed the bidders to immediately make any request or inquiry in writing in respect of any contradiction, omission or obscurity discovered in the tender documents, failing which, the terms in offer would be deemed accepted and the Employer would be exempted from any responsibility. This means that any financial risk ensuing therefrom will be deemed to have been taken into consideration in the bid price, as provided by Sub-Clause 70.2 which was also known to the tenderers.

121. The foregoing rules of interpretation lead the Tribunal to conclude that Respondents' conduct, in the circumstances of the case, is such as to leave no doubt that they understood the intention of the Employer and acceded to it, thus forming a common intention. This appears to be the only possible interpretation of Respondents' conduct, or rather silence, by the absence of any reaction on their part. Indeed, the Employer had the right, in the light of the requirements of good faith, confidence and loyalty expected from the other Party, to consider that

its intention to impose a limitation on the Price Adjustment, as provided by the added Sub-Clause 70.6(a), had been understood and deemed to be met by acceptance on the part of the Contractor, which eventually signed the Contract without changing that Sub-Clause. It is not for the Tribunal to speculate about the reasons for this behaviour and, in particular, whether, as suggested by Claimant (*supra*, para. 43), the failure to raise objections related to Respondents' eagerness to win a competition that, as indicated by Mr. Large, "*was a very intense and tough one*". What matters in the eyes of the Tribunal is the acceptance of Sub-Clause 70.6(a) by Respondents after being made aware of the Employer's interpretation of this provision.

122. Respondents contend that the Parties agreed by their invoicing practice to disregard Sub-Clause 70.6(a). The argument is based on the circumstance that the format of invoice adopted since Invoice N. 1 does not indicate that the repayment of the Advance Payment is to be deducted when calculating the Price Adjustment. In particular, Respondents rely on Invoice n. 11, the first issued after repayment of the Advance Payment had begun (*i.e.*, when 30% of the Contract Price had been invoiced), on which the Employer made a number of corrections but failed to proceed to deduct the amount of the

repayment of the Advance Payment from the scope of Price Adjustment.

In Respondents' view, this evidences Claimant's agreement to vary the terms of the Contract by disregarding Sub-Clause 70.6(a).

123. The argument is not convincing. Firstly, Eng. Ibrahim Aly testified at the hearing that Invoice N. 11 was corrected only as regards quantities but not from a contractual standpoint, this exercise being performed every two or three invoices (transcript, pages 42 and 64 to 66). More importantly, under Egyptian law the parties' conduct in the contract performance may be relevant as evidence of their common intention only if such performance is consistent over a reasonable period of time (see references in Claimant's Post-Hearing Memorial, para. 35 and related footnotes). In our case, only one invoice, namely Invoice N. 11, *i.e.* the one showing for the first time the amount of the Advance Payment repayment, was not corrected immediately by the Employer but only sometime later, the previous invoices showing no amount of repayment of the Advance Payment. These events are insufficient to give rise to a Parties' practice capable of modifying the interpretation of a clause made clear by more relevant circumstances.

124. The conclusion reached by the Tribunal regarding the Parties' common intention makes it superfluous to resort to other rules of interpretation, external to the Contract, which in case of persisting doubts might have had title to apply. Thus, in particular no resort may usefully be made to the "*contra proferentem*" rule invoked by Respondents or to the UNIDROIT Principles or to usages of the trade in this field.

V. THE TRIBUNAL'S DECISION

A. Regarding the interpretation of the Contract

125. Having completed the examination of the relevant provisions of the Contract and of the Parties' positions in that regard, it is now time for the Tribunal to reach a decision on the Parties' respective prayer for relief. The issue confronting the Tribunal is obviously not that to rewrite the Parties' agreement but to give effect to their common intention as made manifest by the analysis that has been conducted so far.
126. The Tribunal concludes that for purposes of its decision the following interpretation of the relevant provisions of the Contract are to be retained:

- a) *“the amounts invoiced by the Contractor”* under Sub-Clause 70.6 (a) are only the amounts in item (c) and, if applicable, (d) and (e) of Sub- Clause 60.1;
- b) the Price Adjustment under Sub-Clause 70.3 applies only to the amounts in item (c) and, if applicable, (d) and (e) of Sub-Clause 60.1;
- c) *“the portion of the Advance Payment to be credited by the Contractor”* under Sub-Clause 70.6 (a) is the amount of the repayment of the Advance Payment falling due in the relevant bi-monthly period under Sub-Clause 60.7;
- d) the Advance Payment under Sub-Clause 60.7 is to be repaid interest-free, the total amount of the repayment being equal at the end to the amount of the Advance Payment;
- e) the Price Adjustment under Sub-Clause 70.3 does not apply to the repayment of the Advance Payment;
- f) for purposes of Sub-Clause 70.6 (a), the amount of the repayment of the Advance Payment falling due in each bi-monthly period according to Sub-Clause 60.7 is to be deducted from the amounts subject to Price Adjustment for the same period before applying to such amounts the adjustment formula of Sub-Clause 70.3;

g) in the format of invoice under Sub-Clause 60.1 item (i) is meant to come before item (f).

127. Based on the numerical illustration made by Mr. Petit in his witness statement (Statement of Defence, Appendix B, para. 7) and at the hearing (transcript, pages 150-153), assuming that

- 1.000.000 is the amount invoiced;
- 100.000 is the portion of the amount refunded;
- 5% is the adjustment coefficient;

according to the Tribunal's determination, the application of Sub-Clause 70.6(a) is as follows:

$$1.000.000 - 100.000 = 900.000 \times 1.05 = 945.000$$

128. Merely for the sake of completeness, the Tribunal notes that Respondents appear to share the substance of the above determinations (*supra* para. 126), although finding that they are inconsistent with the wording of Sub-Clause 70.6 (a).

Thus, regarding (a) and (b), Respondents state to "*concur with Claimant that the Price Adjustment can solely apply to the amounts in item (c), and if applicable (d) and (e) complies [sic] with Sub-section 70.3*" (Rejoinder, para. 16, page 8).

Regarding (c), Respondents accept that the Price Adjustment does not apply to the repayment of the Advance Payment when stating that

"The Advance Payment is not subject to Price Adjustment ...Repayment of the Advance Payment is not subject to Price Adjustment either" (Statement of Defence, para. 52, page 19).

Thus, further, regarding (d), they agree that the amount of the repayment is interest-free and is equal to the amount of the Advance Payment: *"Sub-Clause 60.7 is unambiguous: Advance Payment is interest-free, with the result that it must be repaid in an amount equal to the amount initially received by the Contractor"* (Statement of Defence, para. 51, page 18), a concept that both Parties emphasise by using the expression: *"cash in, cash out, in equal amounts"* (*supra*, para. 100).

With regard to (e), the Parties agree that Sub-Clause 60.1 has to reflect the substantive rules made by other provisions of the Contract (Statement of Defence, para. 49, page 81: *"Claimant is right to submit that the purpose of Sub-Clause 60.1 is not to set forth the parties' rights with respect to reimbursement of the Advance Payment and Price Adjustment. These issues are primarily dealt with in, respectively, Sub-Clause 60.7 and Sub-Clause 70"*).

129. Respondents' understanding of the critical provisions of the Contract is not different from that of Claimant (sometime they refer to a *"common position with Claimant: Rejoinder, para. 16, page 8"*). Such

understanding reinforces the Tribunal's conviction regarding the manner in which such provisions have to be interpreted.

130. The DAB's decision, reached after having failed to correctly interpret the Parties' intention, has resulted in correcting the Contract, *i.e.* rewriting it, on the mistaken assumption that the Contractor's acceptance was given by error. As the above analysis shows, no error was made by the Contractor when accepting the Contract, including Sub-Clause 70.6 (a). The DAB's decision is accordingly legally mistaken. It is therefore hereby vacated by the Tribunal in exercise of the power conferred by Sub-Clause 67.7 of the Contract (*supra*, para.8).
131. As to the Parties' respective prayer for relief, the conclusion reached by Tribunal as to how Sub-Clause 70.6 (a) is to be interpreted and applied determines the dismissal of Respondents' counterclaim. For the same reason, Claimant's request that Respondents be ordered to pay the difference between all sums paid by Claimant in compliance with the DAB's decision of 26 April 2006 and the sums properly due to Respondents according to the Tribunal's interpretation of Sub- Clause 70.6 (a) is granted.

132. According to Claimant, as of 18 June 2007 (date of Claimant's Post-Hearing Memorial) the amount of said difference is equal to Euro 2.204.820,35 and EGP 19,162,456.86 (Exhibit C27 to Claimant's Post-Hearing Memorial). These amounts have not been disputed by Respondents.

133. Claimant has requested interest on the said amounts "*at such rate and for such period as to the Tribunal shall appear just*" (Reply and Defence to Counterclaim, para. 139, under Fifth). The Tribunal decides that, in the absence of an agreement between the Parties to the contrary, the rate of interest is 5% per annum, as provided by Article 226 CC, and that interest shall run from the date of payment to Respondents of any amount paid by Claimant in compliance with the DAB's decision of 26 April 2006, until the date of actual payment.

B. Regarding costs

134. The Tribunal has broad discretion to fix costs and decide on their allocation under Article 40(1)(2) of the UNCITRAL Arbitration Rules. In exercising its discretion, the Tribunal will consider not only the outcome of the arbitration but also the circumstances of the case, including the conduct of the Parties.

135. Regarding the outcome, Claimant has lost before the DAB but has won in the arbitration. Regarding the circumstances of the case, both Parties have acted professionally and in a cooperative manner in the proceedings. However, account is to be taken of Claimant's responsibility for having submitted to the tenderers a badly coordinated draft of Contract (*supra*, paras. 93 and 94). In turn, Respondents have accepted the Contract without any reservation although made aware of the Employer's interpretation of Sub-Clause 70.6.
136. The Parties have shared equally the advances for the costs of arbitration requested by the Tribunal (*supra*, para. 20). The final amount of the costs under Art. 38 (a) (b) and (c) of the UNCITRAL Arbitration Rules is as follows:
- a) regarding the fees of each arbitrator (including VAT, when applicable):

Dr. Hassan Reda	Euro 73.000
Me. Serge Lazareff	Euro 80.730
Prof. Piero Bernardini	Euro 103.950
 - b) regarding travel and other expenses incurred by the arbitrators (including VAT, when applicable): Euro 11.017,95.

c) regarding the costs of other assistance (meeting rooms rent and transcription services at the Cairo Centre for International Commercial Arbitration): Euro 2.247,19 (equivalent to United States dollars \$ 3,000.00).

The total amount of such costs (rounded) is equal to Euro 270.945,00.

The balance with respect to the amount of the advances paid by the Parties, increased by interest accrued thereon, shall be reimbursed in equal shares to the Parties.

137. In the circumstances, making use of its discretion the Tribunal holds that Claimant and Respondents shall each bear its own costs for legal representation and assistance and, in addition, bear the total amount of the costs under para. 136 in the proportion of one-third and two-thirds, respectively. Accordingly, account being taken of the amounts already advanced by them, Respondents have to pay Claimant the amount of Euro 45.158,00.

° ° ° ° ° °

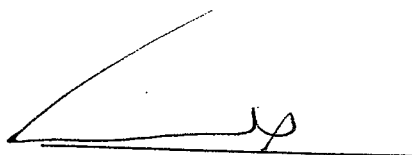
ON THE BASIS OF ALL THE FOREGOING,
THE TRIBUNAL HOLDS AND DECLARES AS FOLLOWS:

1. The DAB's decision of 26 April 2006 is vacated.
2. For purposes of Sub-Clause 70.6 (a), the Price Adjustment formula under Sub-Clause 70.3 applies only to the amounts invoiced by the Contractor in any given bi-monthly period under Sub-Clause 60.1 (c) and, if applicable, (d) and (e), such formula to be applied after deducting from such amounts the amount of the Advance Payment repayment falling due in the same bi-monthly period.
3. Respondents shall pay Claimant the difference between all sums paid by Claimant to Respondents on account of Price Adjustment in compliance with the DAB's decision of 26 April 2006 and the sums properly due to Respondents pursuant to point 2 above, the amount of such difference being equal, as at 18 June 2007, to Euro 2.204.820,35 and EGP 19,162,456.86.

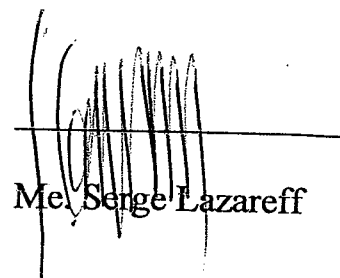
4. Interest shall run on any amounts due by Respondents under point 3 above at the rate of 5% per annum as provided by Article 226 of the Egyptian Civil Code, from the date any such amounts were paid by Claimant to Respondents in compliance with the DAB's decision until the date of actual payment.
5. Respondents' counterclaim is dismissed.
6. Claimant and Respondents shall each bear its own costs for legal representation and assistance and, in addition, share in the proportion of one-third / two-thirds, respectively, the amount of the arbitrators' fees and expenses and the other costs of the arbitration, such amount being equal to Euro 270.945,00.
Accordingly, Respondents shall pay Claimant the amount of Euro 45.158,00, within thirty (30) days from the date of notification of this Award. In case of delay, interest shall run on said amount at the rate provided in point 4 above until the date of actual payment.
7. All other claims or counterclaims of the Parties are dismissed.

Place of arbitration: Cairo (Egypt)

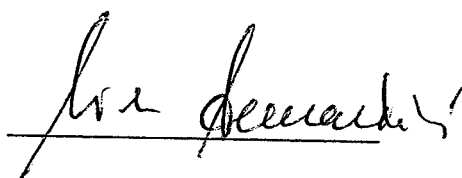
Date: 7 August 2007



Dr. Hassan Reda



Me. Serge Lazareff



Prof. Piero Bernardini
(Chairman)

**IN THE MATTER OF ARBITRATION PROCEEDINGS UNDER THE
UNCITRAL ARBITRATION RULES**

**MINISTRY OF WATER RESOURCES AND IRRIGATION OF THE ARAB
REPUBLIC OF EGYPT**

CLAIMANT

V.

VINCI CONSTRUCTION GRANDS PROJECTS (FRANCE)

BILFINGER BERGER A.G. (GERMANY)

ORASCOM CONSTRUCTION INDUSTRIES (EGYPT)

RESPONDENT

**WITNESS STATEMENT
of**

Eng. IBRAHIM ALY

16 February 2007

Introduction

1. My name is Ibrahim Aly. I am an Egyptian national. I am qualified as a mechanical engineer and I have 26 years of experience in the electro-mechanical and contracting fields.
2. I have been employed by the Ministry of Water Resources and Irrigation, Reservoirs and Grand Barrages Sector (RGSB) since 1983. From 1989 to 1994, I was assigned to the Esna Barrage project, an international project similar to that of the Naga Hammadi Barrage. From 1994 to 2000, I was assigned to the El Salam Siphon project related to the Suez Canal. That project also involved an international contractor. In 2000, I was assigned to its New Naga Hammadi Barrage and Hydropower Plant Division in the capacity of General Director. I currently hold the positions of Contracts Engineer for the Lot 1 Civil Works and General Manager for the Lot 2 Hydro-mechanical Works.

Pre-Award Negotiations

3. My initial involvement concerned Lot 2 of the Project. The RGSB put me in charge of the evaluation of technical and financial matters pertaining to Lot 2, and appointed me as a member of the committee responsible for conducting pre-award discussions (PAD) with the bidders. These negotiations were conducted between February and December 2001.
4. I was subsequently appointed as a member of the equivalent committee formed in relation to Lot 1. The PAD for Lot 1 were conducted over the period February to June 2002.
5. I have a clear recollection that none of the bidders, whether for Lot 1 or Lot 2, ever raised any query or issue with respect to Sub-Clause 70.6(a) of the draft general conditions of contract contained in the Tender Documents, either in their commercial offers or during the PAD.
6. The RGSB Committee never discussed the price adjustment mechanism or the interpretation of the related draft general conditions of contract with any of the bidders. As regards Lot 1, the only information communicated by the Committee

- to the bidders was the provisional sums allocated to price adjustment. (Appendix 1)
7. The minutes of the PAD record that the joint venture comprised of Vinci Construction Grands Projects, Bilfinger Berger A.G. and Orascom Construction Industries (Egypt) - which we informally designated at that time as the "Vinci JV" - commented that the allocated figures were high. (Appendix 1) This suggests that Vinci JV had its own idea as to what the figures should be, based on the existing contractual documentation. I cannot remember the JV's comment specifically, but I have a definite recollection that, at no point in time during the PAD, the RGBS Committee members had any doubt that the parties shared a similar understanding of the price adjustment mechanism.
 8. During the PAD, the RGBS Committee advised the JV that it was at liberty to submit proposals for alternative payment procedures and that these would be considered to the extent that they offer potential benefits in favour of the Employer. (Appendix 2)
 9. On 9 February 2002, Vinci JV submitted such a proposal, setting out direct and indirect benefits for the Employer. (Appendix 3) I reiterate my earlier assertion that the RGBS Committee never provided the JV with any interpretation of the contractual provisions related to the price adjustment mechanism; the JV based its proposal on its own interpretation of the relevant terms.
 10. Having reviewed this proposal, the RGBS Committee advised the JV that it should consider modifying its proposal so as to limit the increase of the advance payment to the foreign currency portion only and to offer a reasonable benefit (discount) to the Employer in consideration for the increase.
 11. The JV heeded the Committee's suggestion and submitted its second alternative payment terms proposal on 2 March 2002. (Appendix 4) This proposal sets out revised figures for the resulting direct and indirect financial benefits to the Employer.
 12. Although neither of the JV proposals attaches any calculations in support of the estimated indirect benefits, I recollect that neither I nor my colleagues on the RGBS Committee ever had any doubt that such benefits were based on the price adjustment mechanism as interpreted by the RGBS. The reason is that, unless the

repayment of the advance payment is deducted, there can be no savings in respect of price adjustment on account of an increase in the advance payment (which was one of the main changes introduced by the JV's proposals.)

13. I am positive that the JV never stated, while presenting its two proposals for alternative payment procedures to the RGBS Committee, that it considered the proposal as a package, as stated by Mr. Large. (Appendix 5) In fact the JV never indicated to RGBS that in the event of its acceptance of the Contractor's proposals, the effective Contract Price would be reduced by a fixed percentage. In addition, one of the components of the proposals was the substitution of a letter of guarantee for the payment of a retention. That part of the proposal was accepted, while the proposals relating to an increase in the amount of the advance payment and the postponement of the period of repayment were rejected. (Appendix 6). It was thus not a matter of "take the package as is, or leave it."
14. I am equally positive that the JV never declared, or even suggested, that it envisaged a different basis for computation of price adjustment than that reflected in its proposals.

Period of Performance of the Lot 1 and Lot 2 Contracts

15. Since the signature of the contracts for Lot 1 and Lot 2 (on 1 June 2002 and 12 December 2001 respectively), I have been part of the RGBS team responsible for their performance.
16. I confirm that the Lot 2 contractor (DSD) has never questioned the manner in which the price adjustment mechanism – which is governed by exactly the same provisions in Lots 1, 2 and across the Project – should apply. In fact, when advance payment repayment began, that contractor calculated the amount due in respect of price adjustment after deducting the value of the repayment, in accordance with the clear terms of Sub-Clause 70.6.(a), and submitted the correct amount in its invoice.
17. To the best of my knowledge, Vinci JV is the only contractor involved in the Project to have challenged the Employer's interpretation.
18. With respect to the format adopted by the JV for the bi-monthly invoices, I would like to clarify the facts. The JV's project manager (Mr. Rolland) initially

submitted the proposed format of the invoice to RGBS on an informal basis. At that time, he stressed that the format was largely dictated by the requirements of the KfW bank and of the JV's bank (CCF).

19. Price adjustment did not come up as part of the discussions between RGBS and the JV regarding the proposed format for the invoices. Rather the discussion was concentrated on whether or not the Advance Payment should be included.
20. In response to the RGBS observation that the Advance itself was the subject of specific rather than progress invoicing, the JV advised that its inclusion in the bi-monthly invoicing was required as an administrative instrument for monitoring of its repayment, but confirmed that this had no impact from a contractual standpoint.

Proceedings before the DAB

21. I was part of the RGBS team that attended the proceedings before the DAB.
22. During these proceedings, Mr. Guillien confirmed the statement made in the JV's Referral to the DAB (Appendix 7) to the effect that the JV's proposals of 9 February and 2 March 2002 were based on an application of Sub-Clause 70.6.(a) as now interpreted by the Employer.
23. During the DAB proceedings, the JV representatives never stated that these calculations were based on "*contractual price adjustment [being] applied to the repayment of the advance*" as now suggested by Mr. Large. (Appendix 5).

Analysis of the JV's Proposals

24. The RGBS recently requested me to verify that the indirect savings mentioned in the JV's proposals of 9 February and 2 March 2002 were calculated by reference to the price adjustment mechanism as interpreted by the RGBS. This entailed calculating the amounts of price adjustment due to the Contractor on the basis of the cash flow and advance repayment schedule attached to the JV's proposals. My calculations confirmed that the JV had applied the price adjustment mechanism as interpreted by the Employer. (Appendix 8)

Conclusion

25. I am aware of the arbitration proceedings pending between RGBS and the Vinci JV. I am further aware that this statement will be submitted in evidence in these proceedings.
26. This statement is made to the best of my knowledge and belief. I believe its contents to be true.
27. I confirm that I am prepared to appear before the Arbitral Tribunal to confirm the contents of my statement and provide any clarifications that the Tribunal may require.

Made this 16th day of February 2007

A handwritten signature, possibly reading 'WJ', is written above a horizontal line.

قرار وزارى

رقم ٤٢٣ لسنة ٢٠٠٦

بتاريخ ١٩ / ٩ / ٢٠٠٦

وزير الموارد المائية والرى :

- ** بعد الإطلاع على الدستور.
- ** وعلى الاختصاصات والسلطات المخولة لنا بمقتضى القوانين واللوائح .
- ** وعلى القانون رقم ٤٧ لسنة ١٩٧٨ الصادر بنظام العاملين المدنيين بالدولة.
- ** وعلى كتاب المستشار رئيس هيئة قضايا الدولة الوارد لنا برقم ١٩٦ بتاريخ ٢٠٠٦/٧/١٩ بشأن تشكيل لجنة مشتركة للدفاع فى القضية التحكيمية أمام مركز القاهرة الاقليمى للتحكيم التجارى الدولى .
- ** ومراعاة لمقتضيات الصالح العام.

قرر

المادة الاولى :

تشكل لجنة الدفاع فى القضية التحكيمية بين وزارة الموارد المائية والرى (مشروع قناطر نجع حمادى الجديدة) واتحاد الشركات (فينسى الفرنسية- بلفنجر الالمانية- اوراسكوم المصرية) برئاسة الأستاذ المستشار / ميلاد سيدهم رئيس هيئة قضايا الدولة وعضوية كل من :-

(أ) عن هيئة قضايا الدولة :

- | | |
|---|--------------------------------------|
| ١- الأستاذ المستشار / صدقى عبد الرحمن خلوصى | النائب الأول لرئيس هيئة قضايا الدولة |
| ٢- الأستاذ المستشار / حسين مصطفى فتحى | نائب رئيس هيئة قضايا الدولة |
| ٣- النائب / أحمد سعد محمود | عضو قسم المنازعات الخارجية |

(ب) عن وزارة الموارد المائية والرى :

- | | |
|--|--|
| ١ - السيد المهندس / حسن محمد على عثمان | رئيس قطاع الخزانات والقناطر الكبرى |
| ٢ - السيد المهندس / محمد عبد العال سيد | رئيس الادارة المركزية - المهندس المقيم للمشروع |
| ٣ - السيد المهندس / أحمد حسن عبد الجابر | مدير عام التنفيذ - نائب المهندس المقيم |
| ٤ - السيد المهندس / إبراهيم على أبو النجا | مدير عام الأعمال الهيدرو ميكانيكية |
| ٥ - السيد المهندس / أحمد محمد إبراهيم كرات | كبير مهندسى الأعمال بالمشروع |
| ٦ - السيد الدكتور / كريم حافظ | المحامي |

وللجنة ان تختار من بين أعضائها مقررًا لها ... وتقوم هذه اللجنة بإعداد كافة الأوراق والمستندات والمذكرات اللازمة للدفاع فى القضية التحكيمية.

بسم الله الرحمن الرحيم

جمهورية مصر العربية
وزارة الموارد المائية والرى
الوزير

المادة الثانية

يصرف لكل من رئيس اللجنة وأعضاء لجنة الدفاع المشكلة بالقرار الوزارى هذا بدل حضور جلسات بواقع ٤٠٠ ج (فقط اربعمائة جنيه) عن كل جلسة وبدل انتقال ثابت بواقع ٣٠٠ ج (فقط ثلاثمائة جنيه) عن كل جلسة وذلك بخلاف المستحقات المقررة لكل منهم بمقتضى القوانين أو اللوائح أو العقود المبرمة فى هذا الشأن عدا السادة أعضاء اللجنة من قبل جهات وزارة الموارد المائية والرى والمذكورين بالمادة الاولى (ب) من رقم (١) الى رقم (٦) .

المادة الثالثة :

تشكيل الامانة الفنية للجنة من كل من :-

(أ) عن هيئة قضايا الدولة :-

١ - السيدة / نادية حسن على

٢- السيدة / وفاء أحمد عزت

وتصرف لكل منهما بدل حضور جلسات بواقع ١٥٠ ج (فقط مائة وخمسون جنيها) عن كل جلسة وبدل انتقال بواقع ٥٠ ج (فقط خمسون جنيها) عن كل جلسة .

(ب) عن وزارة الموارد المائية والرى :-

١ - السيد المهندس / محمود رافع محمد إبراهيم مساعد مدير أعمال بالمكتب الفنى لرئيس قطاع الخزانات.

المادة الرابعة :

يعمل بهذا القرار اعتباراً من تاريخ صدوره وتخطر كافة الجهات المعنية بصورة منه للعمل بموجبه .

على أساس كل ما سبق،
تري هيئة التحكيم وتعلن ما يلي:

1. تم إلغاء قرار لجنة تسوية المنازعات
(DAB Dispute Adjudication Board)
المؤرخ في 26 أبريل 2006.
2. لأغراض البند الفرعي 70.6 (أ)، تنطبق صيغة تعديل الاسعار
بموجب البند الفرعي 70.3 فقط على المبالغ التي يصدرها المقاول في
أي فترة نصف شهرية معينة بموجب البند الفرعي 60.1 (ج)، وإذا
كان ذلك ممكناً، (د) و (هـ)، يتم تطبيق هذه الصيغة بعد خصم مبلغ
الدفعة المقدمة من هذه المبالغ السداد المستحق في نفس الفترة نصف
الشهرية.
3. يجب على المدعى عليهم أن يدفعوا للمدعي الفرق بين جميع
المبالغ التي دفعتها المدعية للمدعى عليهم على حساب تعديل الأسعار
وفقاً لقرار مجلس تسوية المنازعات المؤرخ 26 أبريل 2006 والمبالغ
المستحقة بشكل صحيح للمدعى عليهم وفقاً للنقطة 2 أعلاه، ويكون مبلغ
هذا الفرق مساوياً، كما في 18 يونيو 2007، إلى 2.204.820,35 يورو و 19,162,456.86 جنيه مصري.
4. تسري الفائدة على أي مبالغ مستحقة على المدعى عليهم بموجب النقطة
3 أعلاه بمعدل 5 ٪ سنوياً على النحو المنصوص عليه في المادة 226
من القانون المدني المصري، من تاريخ دفع أي من هذه المبالغ من قبل
المدعي إلى المدعى عليهم وفقاً لقرار مجلس تسوية المنازعات حتى
تاريخ الدفع الفعلي.
5. تم رفض الدعوى المقابلة للمدعى عليهم.
6. يتحمل كل من المدعي والمدعى عليهم تكاليفه الخاصة للتمثيل القانوني
والمساعدة القانونية، بالإضافة إلى حصة بنسبة الثلث / الثلثين، على
التوالي، مبلغ أتعاب المحكمين ونفقاتهم والتكاليف الأخرى للتحكيم،
وهذا المبلغ يساوي 270.945.00 يورو.
وفقاً لذلك، يجب على المدعى عليهم أن يدفعوا للمدعي مبلغ
45.158,00 يورو، في غضون ثلاثين (30) يوماً من تاريخ الإخطار

بقرار التحكيم هذا. في حالة التأخير، يتم احتساب الفائدة على المبلغ المذكور بالسعر المنصوص عليه في النقطة 4 أعلاه حتى تاريخ الدفع الفعلي.

7. يتم رفض جميع الطلبات والمطالبات الأخرى للأطراف.

السيد المهندس / عبد المنعم حمزة
رئيس الإدارة المركزية لمكتب الوزير

تحية طيبة وبعد ،،،

أتشرف بأن أرفق مع هذا مذكرة للعرض على السيد الأستاذ الدكتور / الوزير بخصوص
اللجوء للتحكيم في النزاع الخاص بمبالغ المستخلصات الواجب تطبيق معامل تغيير الأحمال
لمشروع إنشاء قناطر نجع حمادى الجديدة ومحطتها الكهرومائية .
أكون شاكراً للتفضل بالإحاطة والعرض على السيد الأستاذ الدكتور / الوزير للتصديق
بالتوجيه باللائم.

وتفضلوا بقبول فائق الاحترام ،،،

وكيل الوزارة

ورئيس مصلحة الري

ر.أ.د. / محمد بهاء الدين احمد

7/5/4

رقم الملف	٨٩١
التاريخ	٢٠٠٦/٥/١٨

حور

تأشير هذه البرقية
ذات الرقم ٨٩١ لم يمتحور

ختمه بـ

٢٠٠٦/٥/١٨

رقم الملف	٢٤٤٢
التاريخ	٢٠٠٦/٥/١٨

مذكرة للعرض على

السيد الأستاذ الدكتور/الوزير

بخصوص

اللجوء للتحكيم في النزاع الخاص بمبالغ المستخلصات الواجب تطبيق معاملتي تشييد الأسفلت لمشروع إنشاء قناطر نجع حمادي الجديدة ومحطتها الكهرومائية

أتشرف بعرض الآتي

- تم توقيع عقد الأعمال المدنية " Lot 1 " لمشروع قناطر نجع حمادي الجديدة ومحطتها الكهرومائية مع إتحاد الشركات (فينسي فرنسا - بلفنجر ألمانيا - أوراسكوم مصر) في ٢٠٠٢/٠٦/١ .
- تضمن العقد صرف دفعة مقدمة للمقاول بنسبة ١٥٪ من قيمة العقد حوالي (٤٥,٤٠٠ مليون جنيه مصري + ١,٣,٨٠٠ مليون يورو) على أن يتم البدء في استرجاع قيمة الدفعة المقدمة عندما تصل نسبة تنفيذ الأعمال ٣٠٪ من قيمة العقد (محلي + أجنبي) ، كما يتضمن العقد معادلة لزيادة أسعار وفئات قائمة الكميات طبقاً لمؤشرات السوق أثناء التنفيذ وفي وقت تقديم المستخلصات.
- قامت إدارة المشروع في استقطاع قيمة الدفعة المقدمة بدءاً من المستخلص رقم " ١١ " بالنسبة لأعمال المكون المحلي والمستخلص رقم " ١٩ " بالنسبة لأعمال المكون الأجنبي وذلك بعد وصول نسب التنفيذ إلى ٣٠٪ من قيمة العقد وذلك بحساب قيمة المستخلص طبقاً لفئات العقد أولاً ثم استقطاع قيمة الدفعة المقدمة ثم تطبيق معادلة الأسعار لفئات وقائمة الكميات بعد ذلك على الجزء المتبقي من قيمة المستخلص وذلك حسب ما جاء بشروط العقد .
- قام المقاول بالاعتراض على طريقة الحساب حيث يرى المقاول أن يتم حساب قيمة المستخلص ثم يضاف إليها قيمة الزيادة بعد تطبيق المعادلة وبعد ذلك يتم استقطاع قيمة الدفعة المقدمة وذلك بحجة أن الإدارة لم تطبق العقد كما نص .
- نظراً لوجود تضارب في تفسير نص ما جاء بالعقد حسب رؤية الإدارة والمقاول في هذا الخصوص قام المقاول بعرض هذا الموضوع على مجلس فض المنازعات Dispute Adjudication Board "DAB" والذي شكل طبقاً لما جاء في شروط العقد .

- قرر المجلس بعد دراسة هذا الموضوع بتبني وجه نظر المفاوض في تفسير العقد بتطبيق معاداة زيادة الأسعار لقيمة المستخلص قبل استقطاع قيمة الدفعة المقدمة.
- وطبقاً لاشتراطات العقد فإن قرار مجلس فض المنازعات "DAB" يكون سارياً على كل من المالك والمفاوض ومن حق أحد طرفي العقد أن يعبر عن عدم رضائه عن القرار ثم يكون له الحق في اللجوء إلى التحكيم أو إلى حل ودي مع الطرف الآخر للوصول لقرار نهائي وبالتالي فإن لتنفيذ قرار مجلس فض المنازعات فإنه يجب تدبير التمويل المحلي اللازم والذي يبلغ حوالي ١٨ مليون جنيه مصري حتى ٢٠٠٦/٦/٣٠ في حين أن المكون الخاص المناظر يتم دفعه من خلال القرض وذلك قيمة ما تم خصمه من مستحقات المفاوض منذ العمل وحتى ٢٠٠٦/٦/٣٠.
- وبناءً على ما سبق فإننا نوصي بما يلي :

- الاعتراض على قرار لجنة فض المنازعات "DAB" على أن يتم ذلك خلال مدة ٢٨ يوماً من تاريخ استلام قرار اللجنة أي في موعد غايته (٢٠٠٦/٠٥/٢٣) وذلك طبقاً لمتطلبات العقد حتى لا يسقط حق المالك في عرض النزاع على التحكيم وهذا ما تم فعلاً.
- البدء في إجراء حوار مع المفاوض للوصول إلى حل يرضى كل من طرفي العقد.
- قيام قطاع الخزانات بالبدء في اتخاذ إجراءات أعمال التحكيم بالتنسيق مع كل من قطاع قضايا الدولة ومركز القاهرة للتحكيم التجاري الدولي إذا لم يتم الوصول إلى حل مع المفاوض.

والأمر مرفوع لعاليتكم للتفضل بالتوجيه باللازم
وتفضلوا بقبول فائق الاحترام ...

وكيل الوزارة

ورئيس مصلحة الري

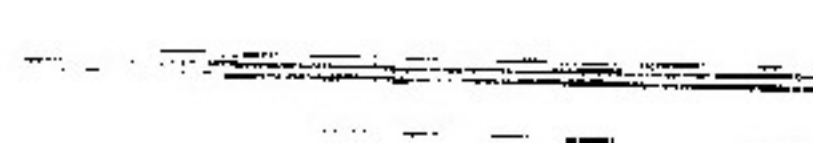


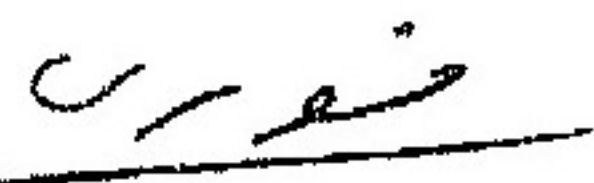
أ.د / محمد بهاء الدين أحمد











مواصلة العمل على

على مدار السنة

الطيار رعايا رانما ز ليد هلال

أ.د / محمد بهاء الدين أحمد

٢٠٠٦ / ٥ / ١٨



NOV 1 2006



NOV 1 2006



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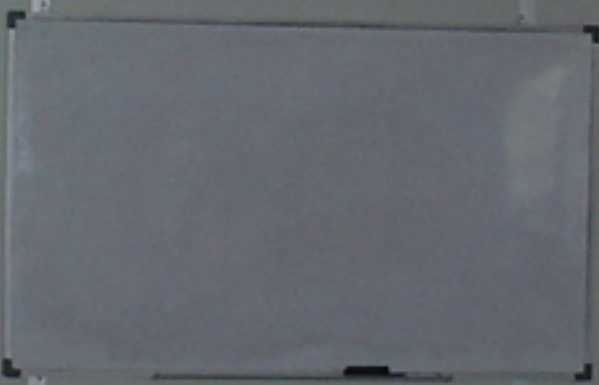
NOV 1 2006



NOV 1 2006

الأسباب التي أدت إلى التفكير في إنشاء القطار الجديدة

- ظهور بعض المشاكل الإنشائية مثل تآكل المونة بين الأحجار خلف القطار بمنطقة العرش ووجود بعض الشقوق الطاعنة.
- تحسين حالة الأرض في المساحات الخلفية مع إمكانية زيادة المساحات لتجديد استصلاح أراضي جديدة.
- تسهيل الملاحة بالسيارة بعد 2 فويس ملاحق بأبعاد أكثر الاستيعاب الحركة الملاحة السريعة.
- إنشاء كوبري بطول بمسودة 70 طن لمواكبة الحمولات الكبيرة.
- الاستفادة من فرق التوازن على القطار في توليد الكهرباء.



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Sec 20A/1

مطيرة القاهرة 0017

مطيرة القاهرة 0017

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NOV 1 2006



NOV 1 2006



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ركب اليوم

العدد ١١٥٧ تصدر عن مؤسسة المصري للصحافة والطباعة والنشر والإعلان والتوزيع ١٦ صفحة - جنيه واحد

معركة بين أ
تلغى أو
إصابة الع
التركية تق



كتب. إيهاب الخطيب وإيه
تفجرت أزمة عنيفة في
التركي أمس، إثر اشتباك أي
المصري المحترف في نادي
مع الإسرائيلي بنيني باليلي،
بعد اشتراك عنيف بينهما. و
التحم اللاعبين في كرة م
عندما حاول اللاعب الإس
أخرى بأيمن عبدالعزيز وتو
دفع كابتن فريق طرابزون لل
أيمن، والاشتباك مع اللاع
جماهير الفريقين أرض المل
عنيفة بين اللاعبين والجماه
في السيطرة على الموقف.
من جانبه، أكد أيمن ع

مصر تفوز بالتحكيم الدولي في قضية قناطر نجع حمادى الحكومة تستعيد ٤٠ مليون جنيه من ثلاث شركات مقاولات دولية

و«بلفنجريرجر» الألمانية، و«أوراسكوم»
للإنشاءات المصرية. كان يمثل الحكومة
المصرية فى التحكيم مكتب الدكتور
كريم حافظ للتحكيم الدولي
بتكليف من قسم
المنازعات الخارجية
بهيئة قضايا الدولة
برئاسة المستشار
ميلاد سيدهم
رئيس الهيئة.

حصل الدكتور
«كريم حافظ» ممثل
الجانب المصرى
على جميع طلبات
دفاعه، حيث نص
قرار التحكيم على
استعادة مصر لـ ٤٠
مليون جنيه، بالإضافة
إلى ٥% كـفائدة على
المبالغ التى دفعتها بعد
قرار «الداب»، مضافا إليها
نسبة ٥% أخرى كـفرامة فى حال
تأخر الشركات الثلاث عن دفع المبلغ
بأكمله، ومنحت هيئة التحكيم الشركات
الثلاث شهرا لدفع المبلغ بالكامل
للحكومة المصرية.

تكونت هيئة التحكيم من الإيطالى
الدكتور «بيروبير نارديني» والمصرى
الدكتور «حسن رضا»، والفرنسى «سيرج
لازيروف»، وجرت وقائع التحكيم فى
القاهرة، ومثل فيها الشركات الثلاث
أحد كبار المحكمين الفرنسيين «إيف
درينس».

كتب. علاء الغطريفى:
فازت الحكومة المصرية بالتحكيم
الدولى فى قضية النزاع مع كونسورتيوم
من ثلاث شركات مقاولات دولية
حول أسلوب تطبيق معادلة

احتساب سعر التعاقد فى
ضوء تغير الأسعار فى
عملية تنفيذ قناطر
نجع حمادى بقنا.

أصدرت الحكم
لجنة الأمم المتحدة
للقانون التجارى
الدولى «يونسترال»
فى ٧ أغسطس
الجارى، ويقضى
باستعادة الحكومة
المصرية لـ ٤٠ مليون
جنيه بدأت فى دفعها
لكونسورتيوم من ثلاث
شركات مقاولات دولية
بعد قرار من هيئة «الداب»
الاستشارية جاء فى صالح
الشركات المنفذة للمشروع.

بدأ التحكيم فى القضية منذ أكثر من
عام بعد لجوء الحكومة إلى التحكيم،
بعد قرار «الداب» (قرارها غير ملزم
بعكس التحكيم الدولى) بدفعها فارق
الأسعار لصالح الشركات المنفذة
للمشروع، ومن ثم بدأت فى تسديد
المبلغ، لحين الفصل فى قضية التحكيم.
ثار النزاع فى يونيو من العام الماضى
بين وزارة الرى والشركات الثلاث
«فينسى كونسترکشن» الفرنسية،

الرقابة
ثقافة
لاحياته
بـ

ت عليهم.
رق حسنى وزير
المنعم صلاحيات
جعلته صاحب
سير فى الوزارة،
صدار قرارات
سواء القطاعات
تسمح بتيسير
ة بعملهم وصرف
لدولة، قد أمرت
هامين وقررت
نميس الماضى،
ة التحقيق، ثم تم
١٥ يوما أخرى
يق الذى يشرف
ار هشام بدوى،
أول، وبياشرها
بهاى حمودة
مهدى شعيب،

هجمات
ة
اقتصادى